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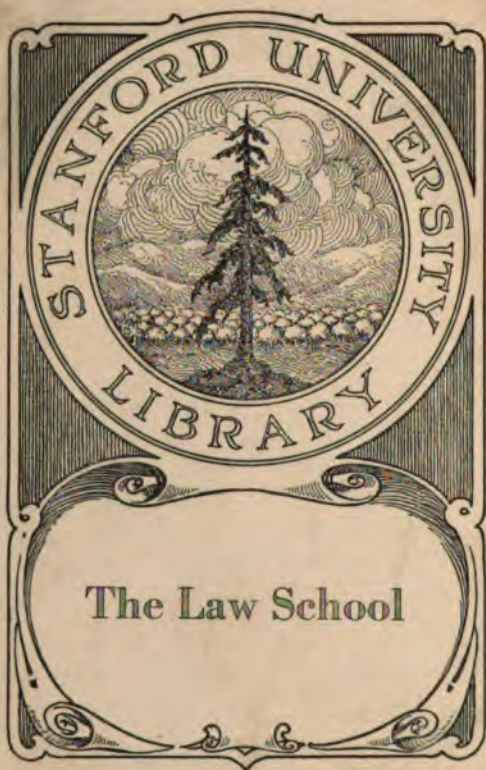
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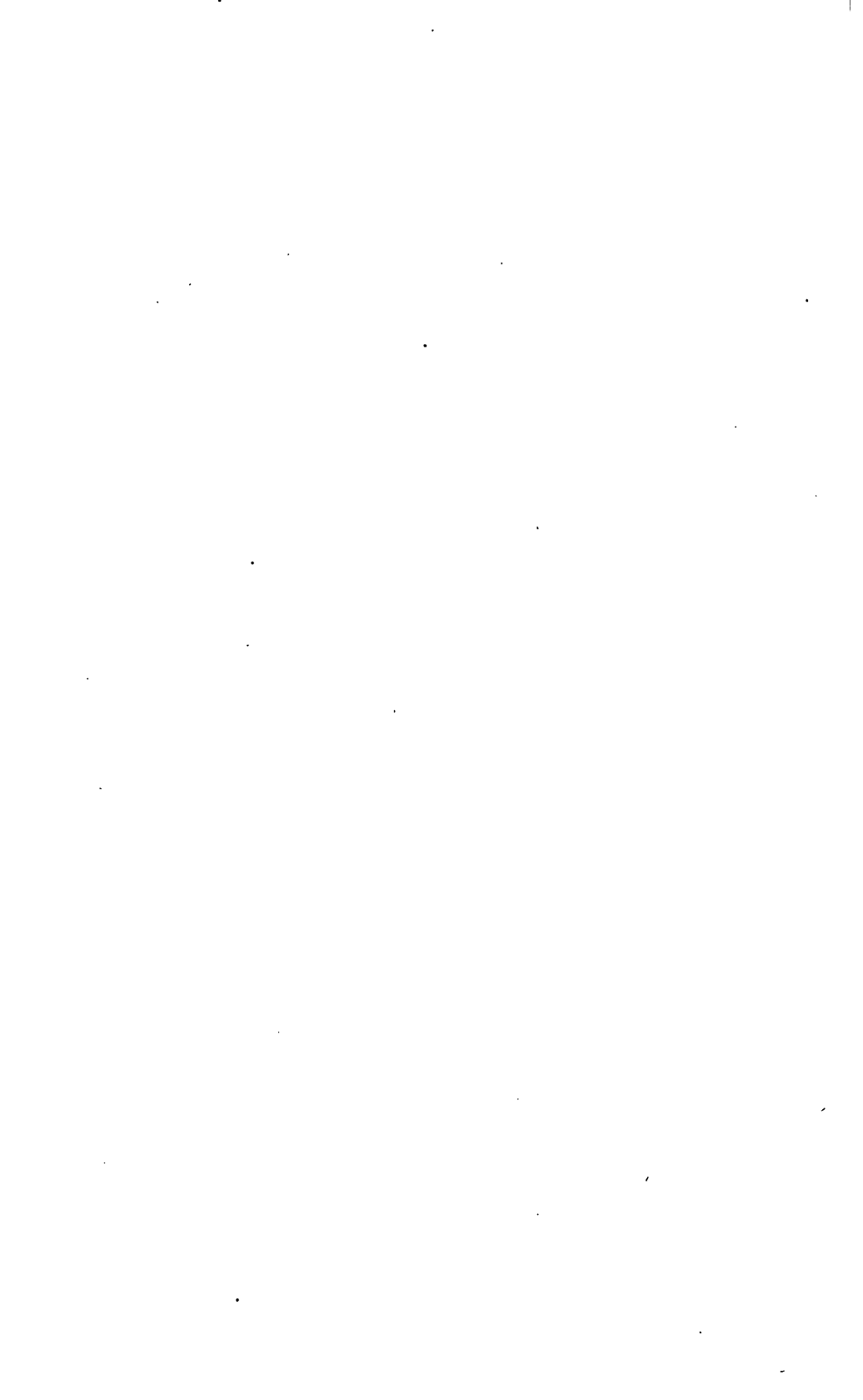
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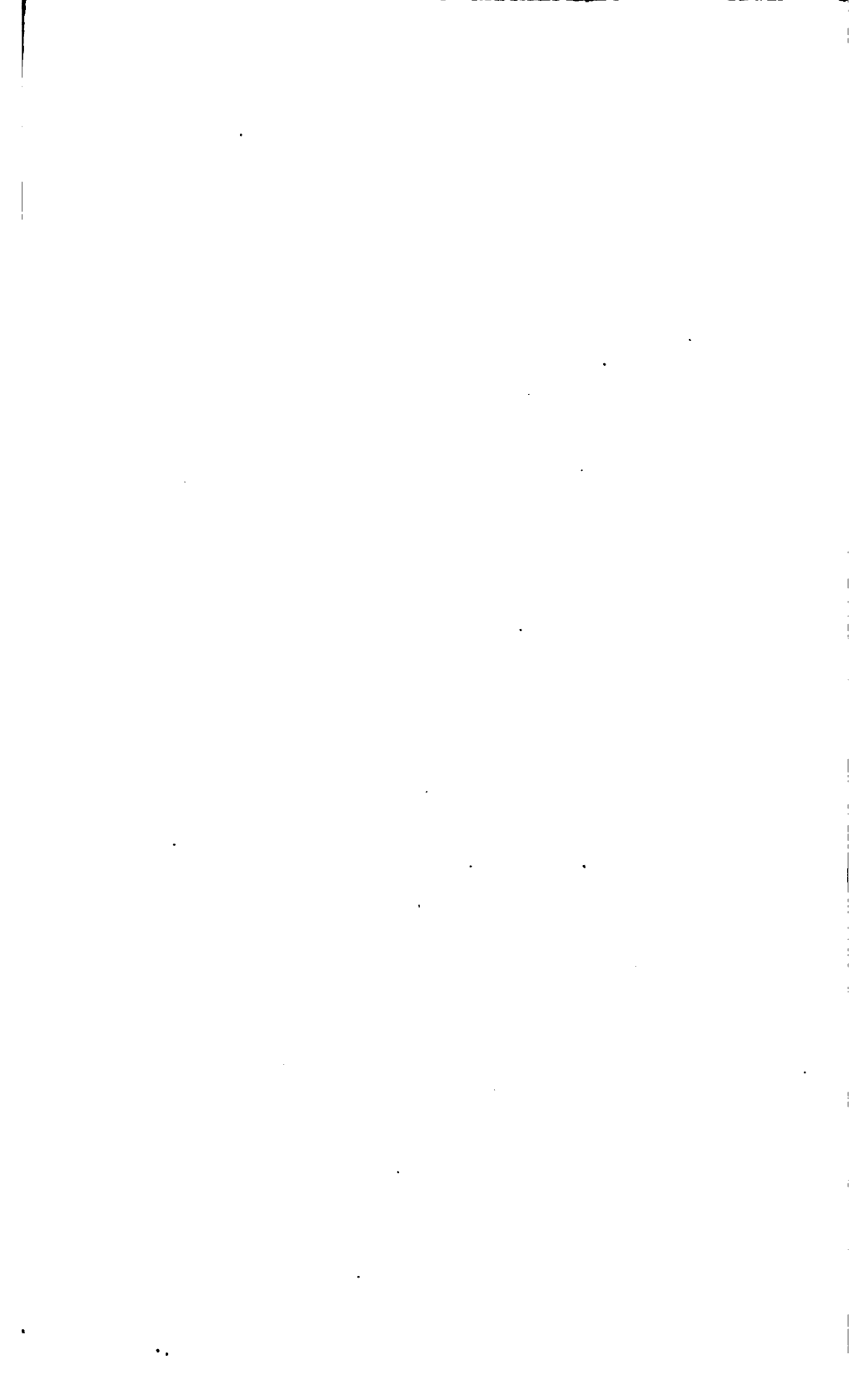
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H. L. GILLASPIE











REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

Millar's

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT.

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VOL. LI.

CONTAINING

The Cases in the Court of Queen's Bench, in Trinity Term and Vacation, Michaelmas Term and Vacation, and Hilary Term and Vacation, 7 & 8 Victoria.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1872.

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QUEEN'S BENCH REPORTS.

BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE, Esq.,

AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE, Esq.,

BARRISTERS AT LAW.

NEW SERIES.

VOL. VI.

CONTAINING THE CASES DETERMINED IN TRINITY TERM AND
VACATION, MICHAELMAS TERM AND VACATION, AND
HILARY TERM AND VACATION, 7 & 8 VICTORIA.

WITH

TABLES OF THE NAMES OF CASES ARGUED, AND
THE PRINCIPAL MATTERS.

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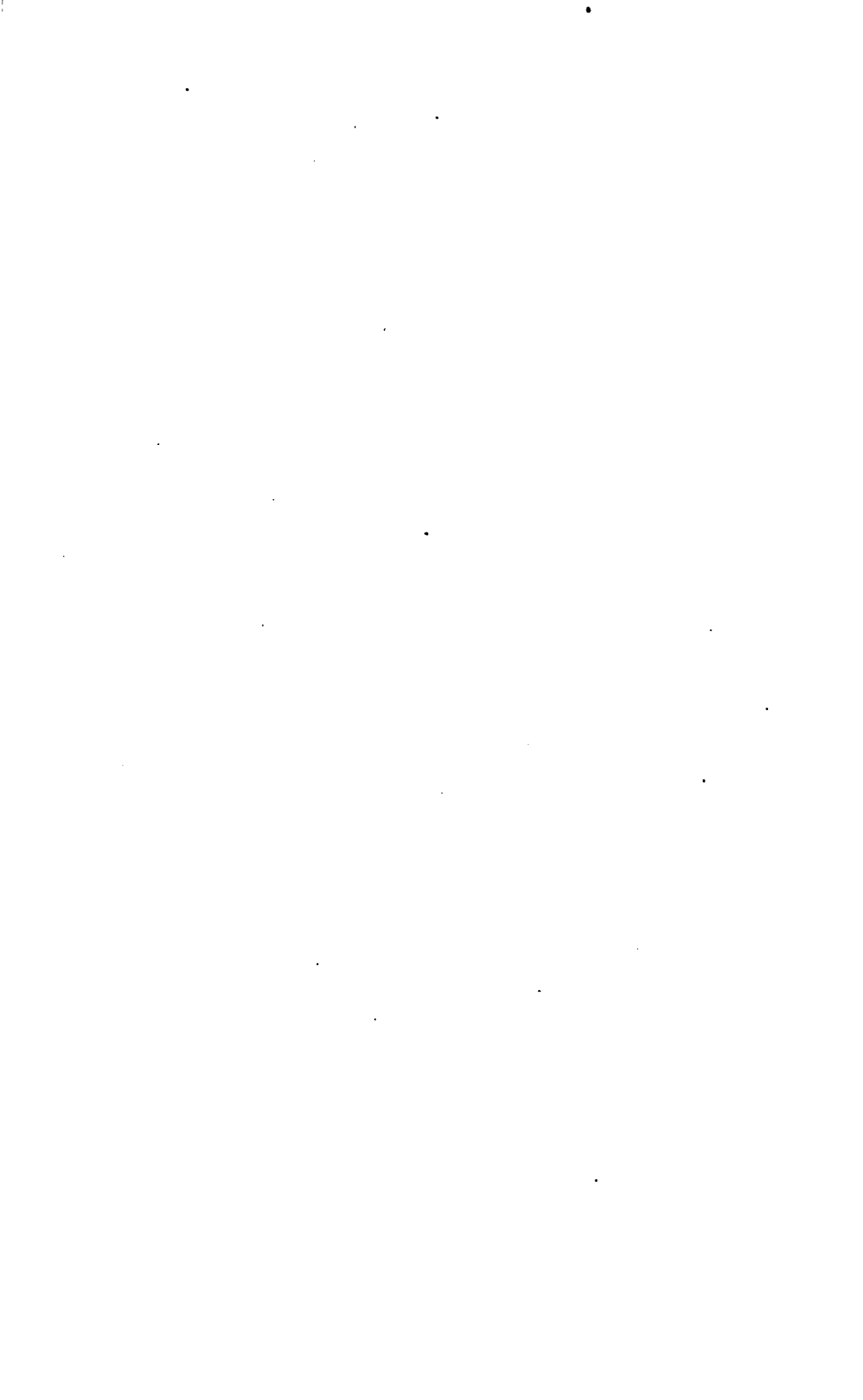
1872.

JUDGES
OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.

ATTORNEY-GENERAL.
Sir WILLIAM WEBB FOLLETT, Knt.

SOLICITOR-GENERAL.
Sir FREDERICK THESIGER, Knt.



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CASES
ARGUED AND DETERMINED
IN
THE QUEEN'S BENCH,

IN
Trinity Term and Vacation,

VII. & VIII. VICTORIA.

Williams

The judges who usually sat in banc in this term and vacation were,

LORD DENMAN, C. J.

WILLIAMS, J.

PATTESON, J.

COLERIDGE, J.

THOMAS BROWN, and JOSEPH CLEAVER and ANN, his
Wife, v. SAMUEL PEGG.

P. demised land to V. for 1000 years to secure a loan. By a subsequent deed he charged the premises with payment to V. of a further loan, making the whole 150*l*. V. called in the money; and, B. and C. having agreed to advance it, an indenture was executed, whereby, in consideration of payment of the 150*l*. to V. by B. and C., and of 15*l*. advanced by them to P., the mortgagor, P. appointed that the land should remain &c. to the use of B. and C., their heirs, &c., with proviso for reconveyance on payment by P. of the 165*l*. and interest, and with a covenant by P. to pay the same; and V., the prior mortgage, assigned the term of 1000 years to B. and C.

Held, (under *statu*. 55 G. 3, c. 184, sched. tit. *Mortgage*, and 3 G. 4, c. 117, s. 2,) that on this last deed an ad valorem stamp of 1*l*. (in respect of the additional 15*l*.) with stamps for progressive duty, was not sufficient, the conveyance of the fee creating a new security, in respect of which a deed stamp was necessary.

COVENANT on an indenture by which defendant covenanted with plaintiffs to pay them 165*l*. with interest at five per cent. Breach, nonpayment of principal or interest. Plea, Non est factum. Issue thereon.

*On the trial, before WILLIAMS, J., at the sittings in London during last Hilary term, the deed declared upon was tendered in evidence, [*2 and objected to as not being duly stamped. The learned judge admitted it, reserving leave to move to enter a nonsuit.

The indenture, bearing date April 18th, 1840, was made between Samuel Pegg, the defendant, of the first part, Samuel Vale of the second part, Thomas Brown and Joseph Cleaver and Ann his wife of the third part, and Joseph Clarke of the fourth part. It recited an indenture(a) of mortgage dated January 21st, 1829, between John Pegg and the said Samuel Pegg,

(a) Neither this nor the after mentioned deeds were in evidence, otherwise than by recital in the deed of 1840.

then his trustee, of the first part, Isaac Sansom of the second part, and Samuel Whitwell, the said Samuel Vale, Nathaniel Merridew and James Weare of the third part, whereby a certain messuage and land, then in the tenure of John Pegg, were demised by John and Samuel Pegg to Whitwell, Vale, Merridew and Weare, their executors, &c., from the day next before the day of the date, &c. for 1000 years, for securing to them, as trustees of Sir Thomas White's charity in Coventry, the repayment of two several sums of 50*l.* and 50*l.*, part of Sir T. White's loan money, advanced to John Pegg and Sansom. The indenture of 1840 further recited that by lease and release of 4th and 5th January, 1830, the release being between John Pegg of the first part, Samuel Pegg of the second part, and Richard Dewes of the third part, the fee simple in possession of the said premises stood limited (subject nevertheless to the first recited indenture of 1829, and to payment of the two sums thereby secured) to such uses and for such estates &c. as Samuel Pegg should by any deed &c. appoint; and, *3] in default, &c., (further limitations:) And that "by a certain other indenture bearing date the 6th day of January, 1830, and made between the said Samuel Pegg of the one part, and the said S. Whitwell, S. Vale, N. Merridew and J. Weare of the other part, the said messuage or tenement, land, hereditaments and premises hereinbefore described or mentioned, hereby(a) appointed or intended so to be, were charged with the payment" to the four last mentioned parties, as trustees as aforesaid, of the further sum of 50*l.*, other part of Sir T. White's loan money, then advanced and lent to Samuel Pegg, and payable at a day therein mentioned and long since past: That the three sums of 50*l.* still remained due: That Whitwell, Merridew and Weare had departed this life, leaving the term of 1000 years vested in Vale by survivorship, but he had ceased to be a trustee of the charity: That the present trustees had called upon Samuel Pegg to pay the three sums of 50*l.*, and that, to enable him to do so, and for other occasions, he had requested Brown and Joseph and Ann Cleaver to lend him 165*l.*, which they had agreed to do on having the said sum with interest secured to them as after mentioned; and that, at the request of Samuel Pegg, Vale had agreed to assign the term of 1000 years as after stated. It was then, by the first mentioned indenture, witnessed as follows.

That, in pursuance of the said agreement, and in consideration of the sum of 150*l.* paid by Brown and Joseph and Ann Cleaver to the Coventry, &c. Banking Company as treasurers of Sir T. White's stock charity, &c. *on the execution of these presents, at the request and by the direction *4] of Samuel Pegg, (receipt endorsed,) the payment of which sum S. Vale acknowledged to be in full satisfaction of the three sums of 50*l.* secured, &c.; and also in consideration of 15*l.* at the same time paid to Samuel Pegg by Brown and Cleaver and his wife, (acknowledgment by S. Pegg;) the said Samuel Pegg, by virtue and in execution of the power,

(a) In the copy of the deed read on the part of the plaintiff, the word was "thereby;" but the copy handed to the court at the conclusion of the argument was as stated in the text.

&c. given him by the recited indentures of 4th and 5th January, 1830, and of every other power, &c., did direct and appoint that the messuage, land, &c., comprised in the indentures of 21st January, 1829, and 6th January, 1830, respectively, as now in the occupation of the said S. Pegg, and all his estate, right, &c., therein, should thenceforth remain, continue and be to the only proper and absolute use and behoof of the said Brown and Joseph and Ann Cleaver and their heirs and assigns for ever. Then followed a proviso for reconveyance if Samuel Pegg, his heirs, &c., should pay the 165*l.* with interest on 18th October then next: power to Brown and Joseph and Ann Cleaver to sell after six months notice, if the 165*l.* or the interest should not be paid at the time and in manner aforesaid: proviso saving the right of foreclosure: covenants by S. Pegg to pay the 165*l.* with interest; for power in S. Pegg to appoint; for quiet enjoyment; for further assurance; for insuring the messuage against fire; and for repairing. And it was further witnessed that, in consideration of the said sum of 150*l.* so paid in discharge of the said three sums of 50*l.* &c., the said Samuel Vale, by the direction of S. Pegg, and on the nomination of Brown and Joseph and Ann Cleaver, did bargain, sell, and assign to the said Joseph Clarke, his executors, administrators and assigns, all such or so much of the *said messuage, land, &c., comprised in the before mentioned appoint- [*5
ment, as was comprised in the said indentures of January 21st, 1829, and January 6th, 1830, respectively, and all the estate, &c. of Samuel Vale in or to the same, habendum to Clarke, his executors, &c., thenceforth for the residue of the said term of 1000 years, in trust for the better securing to Brown and Joseph and Ann Cleaver, their executors, &c., the payment of the said 165*l.* and interest, and in the mean time, and subject thereto, to permit the same to attend the inheritance. Covenant by Vale to Clarke, his executors, &c., against encumbrances by Vale. Declaration by Brown and Joseph and Ann Cleaver as to their joint tenancy in the 165*l.*, and survivorship.

The deed bore a 1*l.* stamp, for ad valorem duty, on the first skin, and 1*l.* stamps on the second and third skins.

A verdict was found for the plaintiffs. In the same term *Peacock* moved for a rule to show cause why a nonsuit should not be entered. He contended that the deed was either a new mortgage for a sum between 100*l.* and 200*l.*, and therefore requiring a 2*l.* stamp; or a transfer of the original mortgage with a new security, namely, the fee simple in reversion, and therefore requiring a deed stamp in addition to that on the mortgage, according to *Lant v. Pense*, 8 A. & E. 248: and, at all events, that a deed stamp was necessary in respect to the 15*l.* newly advanced. A rule nisi was granted.

Erle and *Ball* now showed cause.(a) The deed was an assignment of the original mortgage, and properly *stamped with a 1*l.* stamp for ad valorem duty in respect of the 15*l.*, and progressive duties of 1*l.* and [*6

(a) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, J.

1*l.*, according to stat. 55 G. 3, c. 184, schedule Part I., tit. *Mortgage*, and stat. 3 G. 4, c. 117, s. 2. *Doe dem. Bartley v. Gray*, 3 A. & E. 89, (a) is directly applicable, and was acted upon in *Doe dem. Barnes v. Rowe*, 4 New Ca. 737. [COLERIDGE, J. In a note to *Doe dem. Barnes v. Roe*, 6 Scott, O. S. 525, 538, n. (30), it is observed that stat. 3 G. 4, c. 117, is confined to transfers of mortgages; the case of a further security for an existing debt being still governed by the general stamp act of 55 G. 3.] In *Lant v. Peace*, 8 A. & E. 248, the new advance was upon land not included in the former mortgage; and the land was made a security for the first as well as the last advance. It will be contended that in the present case the deed of 1840 conveys an interest beyond that which was put in mortgage by the prior deeds. But that is not so. By the indenture of January 6th, 1830, the premises, thereby (b) (that is by the indenture of January 6th) appointed or intended so to be, were charged with payment of "the further sum of 50*l.*;" and the effect of the deeds was that the whole 150*l.* then became charged upon the fee simple. By the deed of 1840 the term and the fee so charged were transferred to the plaintiffs as a security for the 150*l.*, and also for the 15*l.* then advanced: thus an additional sum was secured; but no new security was created as in *Lant v. Peace*, 8 A. & E. 248. Stat. 55 G. 3, c. 184, schedule Part I., tit. *Mortgage*, exempts from the ad valorem duty there charged any deed made as an additional or further security for any sum already secured by any deed which shall have paid such ad
*7] valorem duty, where both securities are given by the same person; but provides that, if any further sum be added to the principal amount already secured, the ad valorem duty shall be charged in respect of such further sum. Stat. 3 G. 4, c. 117, s. 2, does not repeal the exemption: it imposes a duty of 1*l.* 15*s.* on the transfer of a mortgage if no further sum be added to the principal money already secured, but enacts that, if any further sum be added, the ad valorem duty "shall be charged only in respect of such further money." [PATTERSON, J.—According to your argument, the deed in question here should be an "additional or further security," to come within the exempting clause.]

Peacock, contra. The deed of 1840 was a new security for the 150*l.* as well as a security for the 15*l.* It is assumed on the other side that the indenture of January 6th, 1830, conveyed or charged the fee; but it only secured the additional sum of 50*l.* upon the premises; it charged the term with that sum, but did not convey to the mortgagees any interest in the fee. The recital of that indenture in the indenture of 1840 speaks of the mes-
sauges "hereby," (that is in the deed of 1840,) not "thereby," appointed. Had this been otherwise, the fee would have been in Samuel Vale on April 18th, 1840, and he must have conveyed by the deed of that date; whereas Samuel Pegg appoints, and Vale only assigns the term. The transaction referred to by the lease and release of January, 1830, was only a sale by John Pegg to Samuel Pegg: no charge upon the fee was then created in

(a) See *Doe dem. Snell v. Tom*, 4 Q. B. 615.

(b) See p. 3, note (u), ante.

favour of the mortgagees. Had the fee been in them when the *deed of 1840 was executed, the term would have been merged. If these [3 views are correct, a new charge was created by that deed in respect of the three sums of 50*l.*, or at any rate of the first two; the subject of that charge being the reversion expectant on the term of 1000 years. The case, therefore, resembles *Lant v. Peace*, 8 A. & E. 248. But, even if the present deed conveyed no new interest, it was not the transfer of a mortgage but the creation of a new one: it created a fresh equity of redemption. Again, in whatever way this indenture operated, it required a deed stamp in respect of the additional 15*l.* The same point arose in *Doe dem. Bartley v. Gray*, 3 A. & E. 89, but was not decided, the court saying: "Whether a common deed stamp also was necessary under either of the acts it is not material to inquire, because the 1*l.* 15*s.* stamp erroneously put on these deeds is sufficient to cover that stamp, if necessary." According to the argument for the plaintiffs, it would be cheaper, in a transaction like the present, to take an additional advance not exceeding 50*l.* than to mortgage for the original sum; which is not likely to have been intended. Stat. 55 Geo. 3, c. 184, sched. tit. *Mortgage*, exempts from ad valorem duty, under that schedule, any deed made as an additional or further security for money already secured by any deed which shall have paid the said ad valorem duty, but requires the duty to be charged if any further sum shall have been added; and the provision as to such further sum is left untouched by stat. 3 G. 4, c. 117, s. 2: but the object of these enactments is merely that the same subject matter shall not be twice charged with ad *valorem duty; it does not exclude other duties. [PATTESON, J. No part of the [9 schedule charges the additional advance with any but ad valorem duty.] Still, from the nature of the instrument, it must require a deed stamp, so far as it secures a new advance. The covenant to pay would render it necessary. In respect of these matters the instrument would at any rate need a stamp of 1*l.* 15*s.*, as a "deed" "not otherwise charged," within the schedule of stat. 55 G. 3, c. 184. [PATTESON, J. The exempting clause of that schedule, as to instruments by way of further security, is confined to cases where both the original and the new security are made by the same person; and to the same person, as appears by the latter part of the clause. Transfers do not seem to be contemplated.] In 5 Jarman's Conveyancing, by Sweet, p. 541, (tit. *Mortgages*,) it is said, referring to *Doe dem. Bartley v. Gray*, 3 A. & E. 89, "It was not necessary (as we have seen) to decide whether the deed then adjudged to be a transfer of a mortgage, required a common deed stamp in addition to the ad valorem duty on the further advance, as the aggregate amount of duty impressed thereon was more than sufficient to cover both. The point, however, seldom arises in practice, as the deed commonly contains a covenant to pay the entire debt, or some other additional matter extraneous to the instrument, considered as a transfer of mortgage properly so called; and, therefore, rendering it unquestionably liable to the additional stamp in question."

Cur. adv. vult.

*10] *Lord DENHAM, C. J., in this term, (June 13th,) delivered the judgment of the court.

This was an action of covenant, and the breach assigned the nonpayment of the principal sum of 165*l.*, and interest, due to the plaintiffs under and by virtue of a certain indenture, whereby the payment of the said sum, with interest, was secured to the plaintiffs. Plea, *Non est factum*.

And the question is, whether the said indenture whereon the action is brought be duly stamped or not. It purports to bear date 18th April, 1840, and to be made between the defendant of the first part, S. Vale of the second part, the plaintiffs of the third, and J. Clarke of the fourth part; reciting an indenture of mortgage of 21st January, 1829, between John Pegg and the defendant, as his trustee, of the first part, Isaac Sansom of the second part, S. Whitwell, S. Vale, N. Merridew and J. Weare of the third part, whereby certain premises therein described were demised for the term of 1000 years for securing the repayment of two several sums of 50*l.* theretofore advanced to John Pegg and J. Sansom; and further reciting that, by certain indentures of lease and release of the 4th and 5th January, 1830, the said premises were conveyed *in fee simple to the defendant*; and further reciting that by a certain other indenture, of the 6th January, 1830, between the defendant of the first part, and the said S. Whitwell, S. Vale, N. Merridew and J. Weare of the other part, the said premises were charged with the payment of a further sum of 50*l.* lent to the defendant; and that the said term of 1000 years had become vested in the said S. Vale by survivorship; and that the defendant had been called upon to repay *the

*11] three said several sums of 50*l.*; it was by the said now reciting indenture witnessed that, in consideration of 150*l.*, and the further sum of 15*l.* advanced by plaintiffs to defendant, the said term of 1000 years was assigned by the said S. Vale to the plaintiffs, and the *fee simple* in the said premises was conveyed to them by the defendant, subject to the usual condition for reconveyance to the defendant on the terms therein expressed. There is also a covenant by the defendant for repayment of the money, upon which the action is brought.

Upon this deed the stamps are a 1*l.* stamp on the first skin, and a stamp to the like amount on the second and third respectively. And the question is, whether those stamps are sufficient.

In support of that proposition it was contended on behalf of the plaintiffs that the true effect of the instrument is to assign the said term of 1000 years for securing to them the repayment of the said sum of 165*l.*; that it is an assignment of such original term and an assignment only. It is obvious, however, that this argument, on which the case of the plaintiffs was made to rest, cannot be sustained. It appears plainly, from the analysis of the deed which we have made above, that not merely the original term of 1000 years was thereby assigned to the plaintiffs, but that the *fee simple* in the said premises is thereby conveyed, and that therefore the instrument operated as a *new security*; and, moreover, that the *fee simple* was not charged

by the said indenture of the 6th of January, 1830. We are of opinion, therefore, that a deed stamp at least became necessary in consequence thereof.

The case of *Doe dem. Bartley v. Gray*, 3 A. & E. 89, was cited *on behalf of the plaintiffs. An answer, however, is given to that case in [*12 the subsequent one of *Lant v. Peace*, 8 A. & E. 248, (which the present more nearly resembles,) that the decision in that (*Doe dem. Bartley v. Gray*, 3 A. & E. 89,) depended upon the particular words of 3 G. 4, c. 117, with respect to the transfer duty, and that the point raised in *Lant v. Peace*, 8 A. & E. 248, did not arise.

Upon the whole we are of opinion that the rule for a nonsuit must be made absolute.

Erle suggested that, as this was a question of defective stamp, which could be remedied, the court would probably, to save expense, make the rule absolute for a new trial on payment of costs by the plaintiffs.

Rule absolute for a new trial on payment of costs by plaintiffs.

MILES v. BOUGH.

Reported, 3 Q. B. 869.

*BRANSCOMBE v. SCARBROUGH.

[*13

Same v. HEATH.

Replevin bonds are not an exception to the rule that, on a bond, the plaintiff cannot recover more than the penalty and costs of suit on the bond.

Therefore proceedings in such suit may be stayed on payment of the penalty and costs, though the plaintiff's costs in the replevin suit much exceed the penalty.

A judge at chambers may order the stay of proceedings.

THE plaintiff in these actions was the defendant in an action of replevin, *Wheeler v. Branscombe*, 5 Q. B. 373. The cause was tried, and a verdict found for the plaintiff, but leave reserved to move to enter a verdict for the defendant. A rule to that effect was made absolute in last Michaelmas vacation, 5 Q. B. 373. The defendant in replevin took an assignment of the replevin bond, and commenced the present actions upon it against Scarbrough and Heath, the sureties. His taxed costs in the cause of *Wheeler v. Branscombe* greatly exceeded the penal sum in the replevin bond, which was only 18*l.* 1*s.*

The defendants, Scarbrough and Heath, took out a summons to show cause at chambers "why, upon payment of the penalty of the bond on which these actions are brought, together with costs to be taxed, all further proceedings in these causes should not be stayed." Cause was shown

before PATTESON, J., who made the order as prayed, giving leave to the plaintiff Branscombe to move this court that the order might be discharged upon either of the two grounds after stated.

M. Smith now moved for a rule to show cause why the order should not be discharged. First, the learned judge had not jurisdiction. Stat. 11 G. 2, c. 19, s. 23, which makes replevin bonds assignable to the avowant *or person making cognisance, enacts that, if the bond be forfeited, *14] the assignee may sue thereon, and "the court where such action shall be brought may by a rule of the same court give such relief to the parties upon such bond, as may be agreeable to justice and reason." A judge at chambers is not "the court" for this purpose. [PATTESON, J. The defendants said that they were not seeking relief under the statute, but merely bringing in the penalty of the bond, as a defendant might do in any case. Then the question arose whether they were entitled to a stay of proceedings on merely paying in the penalty with costs of the actions on the bond.] That is a point which ought not to be summarily decided at chambers. The defendants may raise it by paying the money into court in the actions. The penalty in a replevin bond is only double the value of the goods distrained; in the present instance it is 18*l.* 1*s.*, while the costs of the action are 160*l.* It is laid down in *Lord Lonsdale v. Church*, 2 T. R. 388,(a) that the obligee of a bond may recover damages beyond the penalty, that being merely a security. The doctrine in that case was disputed by Lord KENYON in *Wilde v. Clarkson*, 6 T. R. 303; but is supported by the ruling of LITLEDAL, J., in *Francis v. Wilson*, Ry. & M. 105. [PATTESON, J. That was a very peculiar case. The bond was in the penal sum of 120*l.* conditioned for the payment of that sum with interest.] In an action upon judgment on a bond, interest may be recovered to an amount which makes the whole sum allowed exceed the penalty; *15] *McClure v. Dunkin*, 1 East, 436.(b) In *equity, the penalty of the bond is not considered a necessary limit; *Jeudwine v. Agate*, 3 Sim. 129; *Grant v. Grant*, 3 Russ. 598, 3 Sim. 340. In *Hellen v. Ardley*, 3 Car. & P. 12, an action on a bond, Lord TENTERDEN thought that the plaintiff could not have more than the penalty: but he allowed the jury to give a verdict for one shilling beyond, reserving leave to move to increase the damages; and, if a shilling could be recovered beyond the penalty, a larger sum might. [COLERIDGE, J. To succeed in this motion, you must show a distinction between replevin bonds and others. The note (1) on *Gainsford v. Griffith*, 1 Wms. Saund. 58 b,(c) lays down the doctrine generally.]

Lord DENMAN, C. J. To grant a rule in this case would be creating a doubt where none really exists. *Lord Lonsdale v. Church*, 2 T. R. 388, has been overruled on the point now discussed: and the case before Lit-

(a) See the cases discussed in *Crafts v. Wilkinson*, 4 Q. B. 74.

(b) See *Ibbotson v. Fenton*, 6 A. & E. 772, 776.

(c) And see notes (c.) (d.) *ibid.* 6th ed.

TLEDALÉ, J., cannot be considered as re-establishing it. In *Hellen v. Ardley*, 3 Car. & P. 12, it might be wrong to allow a verdict for even the shilling; but the ruling, at all events, did not affect the general doctrine on this subject.

PATTESON, J. The one shilling was given there for detention of the debt; and perhaps it was not right to give it.

WILLIAMS and COLERIDGE, Js., concurred.

Rule refused.

*DAVIS v. HENRY JOHN CLARKE.

[*16

John Hart drew a bill payable to himself or order, addressed to John Hart; C. wrote across this, "accepted, H. J. C." Held, that C. could not be sued as acceptor of a bill of exchange directed to him.

ASSUMPSIT. The first count stated that "one John Hart," on 8th March, 1838, "made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to him or his order 100*l.*," value received, at twelve months after date, which had elapsed before the commencement, &c.; "and the defendant then accepted the said bill, and the said John Hart then endorsed the same to the plaintiff;" averment of notice to defendant, promise by him to pay plaintiff, and that he did not pay.

There was also a count on an account stated.

The first plea denied the acceptance; the second the promise; the third alleged a discharge of defendant by the Insolvent Debtors' Court.

The replication joined issue on the first two pleas, and traversed the discharge alleged in the third; on which traverse issue was joined.

On the trial, before PARKE, B., at the Essex Summer assizes, 1843, a written paper, in the following terms, was given in evidence on behalf of the plaintiff.

"£100.

London, 8th March, 1838.

"Twelve months after date pay to me or my order one hundred pounds, value received.

"To Mr. John Hart.

JOHN HART."

Across the face of this instrument was written

"Accepted.

"H. J. Clarke.

"payable at 319 Strand."

*This was proved to be in the defendant's handwriting.

No other evidence being produced, the learned baron directed a nonsuit. In Michaelmas term, 1843, *Petersdorff* obtained a rule nisi for a new trial. [*17

Sir F. Thesiger, solicitor-general, now showed cause. The defendant has not accepted the bill described in the declaration: the instrument produced is indeed no bill of exchange. In *Gray v. Milner*, 8 Taunt. 739,

where the instrument was not addressed to any one, but had only a place of payment added, and in other respects resembled the document here proved, the acceptor was held liable, as having admitted himself, by the acceptance, to be the party pointed out by the place of payment. Here the drawer addresses himself; and the instrument more nearly resembles a promissory note. It may be that the defendant might have been sued as a surety.

Petersdorff, contra. The principle of *Gray v. Milner*, 8 Taunt. 739, applies. The defendant, by his acceptance, estops himself from disputing his own character and the nature of the instrument. In *Polhill v. Waller*, 3 B. & Ad. 114, indeed, it was said that no one could be liable as acceptor, unless he were the person to whom the bill was addressed, or an acceptor for honour. But the question of acceptance in this form was not then distinctly before the court. Here it may be contended that the defendant identifies himself as the person addressed under the name of John Hart. The judge at Nisi Prius was requested, but refused, to allow an amendment, by calling *the instrument a promissory note made by the defendant; the writing the name was a new making, according to the principle of *Penny v. Innes*, 1 C. M. & R. 439, S. C. 5 Tyrwh. 107.(a) (He referred also to *Jackson v. Hudson*, 2 Camp. 447.)

LORD DENMAN, C. J. There is no authority, either in the English law or the general law merchant, for holding a party to be liable as acceptor upon a bill addressed to another. We must take it on this instrument that the defendant is different from the party to whom it is addressed. *Polhill v. Waller*, 3 B. & Ad. 114, and *Jackson v. Hudson*, 2 Camp. 447, are authorities showing that the defendant here cannot be sued as acceptor. In *Jackson v. Hudson*, 2 Camp. 447, Lord ELLENBOROUGH treated an acceptance by a party not addressed as "contrary to the usage and custom of merchants."

PATTESON, J. No previous case seems to be exactly like this. In *Jackson v. Hudson*, 2 Camp. 447, there was one acceptance by the party to whom the bill was addressed, prior to the acceptance by the defendant. In *Gray v. Milner*, 8 Taunt. 739, no party was named in the address; and I must say that the decision in that case appears to me to go to the extremity of what is convenient. It may be considered as having been decided on the ground that the acceptance was not inconsistent with the address, so that the acceptor might be deemed to have admitted himself to be the party addressed. But here another person, the drawer himself, is named in the *address. I do not know that a party may not address a bill to himself, and accept, though the proceeding would be absurd enough. Then it is said that the defendant is estopped: but that cannot be supported where the instrument shows, on its face, that he cannot be the acceptor.

WILLIAMS, J. The only question is, whether the defendant is such an acceptor as is described in the declaration; that is of a bill of exchange

(a) See *Gwinnell v. Herbert*, 5 A. & E. 436.

directed to him. No doubt this can be so only where he is the drawee; but here the bill is not addressed to the defendant at all. This is therefore not an acceptance within the custom of merchants.

COLERIDGE, J. The safe course is to adhere to the mercantile rule that an acceptance can be made only by the party addressed, or for his honour. Here the last is not pretended; and the first cannot be presumed. If the John Hart addressed is different from the John Hart who draws, there is still no acceptance; if the same, then the instrument is a promissory note and not a bill of exchange.

Rule discharged.

*FAWCETT v. FEARNE and Others. May 25. [*20

Under stat. 6 G. 4, c. 16, s. 72, which empowers the commissioners in bankruptcy to dispose of goods being in the possession, order or disposition of the bankrupt as reputed owner "at the time he becomes bankrupt," the time meant is that of committing the act of bankruptcy, not the time when the fiat issued; stat. 2 & 3 Vict. c. 29, s. 1, making no alteration in this respect.

A trader assigned his effects to a trustee, thereby committing an act of bankruptcy. Afterwards a creditor, ignorant of the act of bankruptcy, took in execution the trader's goods comprised in the assignment. The trustee paid off the execution, and took an assignment of the goods from the sheriff.

A fiat in bankruptcy having afterwards issued against the trader, *Held*, that, although the levy made by the execution creditor might have been protected by stat. 6 G. 4, c. 16, s. 81, or 2 & 3 Vict. c. 29, the party who had become assignee of the sheriff with knowledge of the act of bankruptcy, could not avail himself of that protection, and that the assignees in the bankruptcy might bring trover against him for the goods.

TROVER for cattle, goods and chattels. Pleas. 1. That plaintiff was not nor is possessed, &c. 2. Not guilty. Issues thereon.

The cause was tried before WIGHTMAN, J., at the York Summer assizes, 1843. The material facts of the case are fully detailed in the following statement, which forms part of the judgment delivered by the court on disposing of the aftermentioned rule.

"This was an action of trover against the defendants, who are the assignees of a bankrupt of the name of Bradwell, to recover damages for the conversion of certain cattle, goods and chattels which the defendants had seized, upon the issuing of the fiat, as part of the bankrupt's estate, but which the plaintiff claimed as his property.

"The plaintiff was uncle to the bankrupt, and a creditor to a considerable amount: and, on the 15th of August, 1842, the bankrupt made an assignment to him and a person of the name of Simpson for the benefit of creditors. This assignment was produced by the defendants, and was the only act of bankruptcy proved in the cause. The fiat was issued on the 25th of January, 1843.

"On the 15th of August, 1842, being the same day upon which the act of bankruptcy was committed, but some hours before the assignment was executed, and therefore before the act of bankruptcy, the sheriff of Yorkshire seized certain of the bankrupt's goods under a *fi. fa.* [*21

at the suit of the Low Moor Company, endorsed to levy 462*l.* 12*s.* and 13*l.* for costs upon a hostile judgment obtained by them against Bradwell the bankrupt. On the 17th of August the sheriff assigned the goods seized to the Low Moor Company by bill of sale in satisfaction of their execution; and the plaintiff, having paid to the Low Moor Company the amount for which the goods were assigned to them by the sheriff under their execution, took an assignment from them on the 12th of October, of the property seized by the sheriff under their execution. Formal possession was given under both assignments.

“On the 23d of August, 1842, three other writs of *fi. fa.*, at the suit of *bonâ fide* and hostile judgment creditors, were delivered to the sheriff, who, on or about that day, seized certain goods of the bankrupt under them. The amount of these three executions altogether was about 282*l.*

“On the 15th September these executions were paid off by the plaintiff, who took an assignment from the sheriff of the goods seized under these executions. The plaintiff wished the sheriff to include in the inventory all the goods of the bankrupt not included in the seizure under the execution at the suit of the Low Moor Company, alleging that, as he would pay the creditors 20*s.* in the pound, it would not signify. This, however, was not done; but goods, which afterwards sold for 584*l.*, were put into the inventory to the assignment under the three *executions. The sheriff then retired altogether; *22] and Bradwell continued in the apparent ownership of the property down to the 25th of January, when the fiat issued, and had them, as found by the jury, in his possession, order and disposition, with the consent of the plaintiff, down to that time.”

The defendants' counsel relied upon stat. 6 G. 4, c. 16, s. 72, contending that the words of that clause, “at the time he becomes bankrupt,” refer, not to the time of committing the act of bankruptcy, but to the time of issuing the fiat; and that the goods in this case were, at the latter period, in the possession, order and disposition of the bankrupt, with the consent of the true owner, assuming the plaintiff to have been so. The learned judge left it to the jury, as the only material question in the case, whether, on the 25th of January, 1843, when the fiat issued, Bradwell was the reputed owner of the goods and had them in his possession, order or disposition by the consent of the true owner. The jury were of opinion that he had, and found a verdict for the plaintiff.

In Michaelmas term, 1843, *Hoggins*, by leave reserved at the trial, moved for a rule to show cause why the verdict should not be set aside and a nonsuit entered, or a verdict for the defendants, or why the verdict should not be reduced to such sum as the court should direct. A rule nisi was granted.

Knowles, Joseph Addison and Pashley now showed cause. (a) First, the assignment by Bradwell to the plaintiff was not affected by stat. 6 G. 4, c. *23] 16, s. 72, unless the words “when he becomes bankrupt,” in that clause, refer to the time of issuing the fiat. But this is not the true

(a) Before Lord Denman, C. J., Patteson, Williams, and Wightman, J.

construction ; the trader becomes bankrupt, in the proper sense of the word, when he commits the act of bankruptcy, not when the fiat issues ; *Smith v. Topping*, 5 B. & Ad. 674. The same construction was put upon stat. 21 Jac. 1, c. 19, s. 11, (which does not materially differ from this clause,) in *Lyon v. Weldon*, 2 Bing. 334, and *Jones v. Dwyer*, 15 East, 21. Stat. 2 & 3 Vict. c. 29, s. 1, does not alter the operation of stat. 6 G. 4, c. 16, s. 72, though some expressions in *Whitmore v. Robertson*, 8 M. & W. 463, 476, may seem to imply that it does. It is there said that the effect of the later statute “seems to be, in the case of bonâ fide contracts, and dealings, and executions, to do away with the relation to the act of bankruptcy, and substitute the issuing of the fiat for the act of bankruptcy, as the time at which the right of the assignees is to accrue.” But that dictum must be taken as referring to the particular subject matter then before the court, and to the bearing of the new act upon sect. 108 of stat. 6 G. 4, c. 16. The act of Victoria does not notice sect. 72 of the former statute, and cannot have been meant to annul it by mere implication. If this view of the statutes be correct the verdict is right, no part of the property having been in Bradwell’s possession when he became bankrupt, “by the consent and permission of the true owner,” because none of the goods then in his possession had any true owner but himself.

Secondly, if Bradwell’s assignment to the plaintiff is invalid as having been made after Bradwell became bankrupt, the plaintiff may still claim under the assignments made to him by the Low Moor Company on the *12th of October, and from the sheriff on the 15th of September; [*24 for the executions under which the assigned property had been taken were valid, not only under stat. 2 & 3 Vict. c. 29, but also under stat. 6 G. 4, c. 16, s. 81, both executions being carried into effect more than two calendar months before the issuing of the fiat, and by persons who, at the time of levying, had no notice of any prior act of bankruptcy. The plaintiff had such notice ; but that does not affect his title derived from parties who had none. If it be alleged that the sheriff had notice, that, if true, does not affect the execution creditor ; the sheriff is not his agent for the purpose of receiving such notice ; *Ramsey v. Eaton*, 10 M. & W. 22. The plaintiff’s case is unquestionable under the first execution, which was prior to the alleged act of bankruptcy ; and, on account, probably, of that distinction, an alternative proposed in the rule is, to reduce the damages. But the plaintiff’s title is good under both executions.

Dundas, W. H. Watson and Hoggins, contrâ. Stat. 6 G. 4, c. 16, s. 72, applies to this case, the goods having remained in the possession, order and disposition of the bankrupt from the 15th of August down to the issuing of the fiat. [PATTESON, J. The jury find only that they were so at the time when the fiat issued.] It would be a very inconvenient construction of sect. 72, if a party might enjoy a false credit for several months by the possession of goods, and, when a fiat issued, refer to the commencement of that time as the period when he became bankrupt. [PATTESON, J. The

opposite construction, too, may be attended with great inconvenience.] It

*25] is not to be assumed here that the assignment to the "plaintiff" was the act of bankruptcy on which the fiat proceeded: (a) the defendants were not called upon to prove any, no notice having been given of an intention to dispute it; (b) and it might therefore be taken that the act of

*26] bankruptcy immediately preceded the fiat. But it is "unnecessary to make this supposition, because, whatever may formerly have been considered the time of becoming bankrupt with reference to the question of reputed ownership, the statute 2 & 3 Vict. c. 29, s. 1, now identifies that time with the time of issuing the fiat. *Whitmore v. Robertson*, 8 M. & W. 463, shows how that statute operates upon the construction of sect. 108 of stat. 6 G. 4, c. 16; and the judgment in *Re Sivan*, 2 Mont. Deac. & De Gex, 219, must have proceeded on the ground that sect. 72 also is affected by the statute of Victoria. Notice to an insurance company of the pledge and deposit of a policy was there held to prevent its passing to the assignees, the notice having been given after an act of bankruptcy, but before the fiat. Such notice could have been necessary only to bar the operation of sect. 72: it clearly was not needed to complete the title of the party receiving the pledge. [PATTERSON, J., referred to *Ex parte Rose*, 2 Mont. D. & D. 131, and *Ex parte Smith*, Ibid. 213.] In *Skey v. Carter*, 11 M. & W. 571, as in *Whitmore v. Robertson*, 8 M. & W. 463, it was held that, since the

(a) The defendants, at the trial, attempted to prove an act of bankruptcy committed in October, 1842.

(b) Under stat. 6 G. 4, c. 16, s. 90, a defendant, who is assignee of a bankrupt, may prove the act of bankruptcy at nisi prius by merely putting in the proceedings, if the opposite party has given no notice to prove the petitioning creditor's debt, &c., and if it be clear that such opposite party must have known that the bankruptcy would be relied on by defendant, though defendant is not named assignee on the record.

Pushley, in Michaelmas term, 1843, after the defendants had obtained their rule nisi, moved (before Lord DENMAN, C. J., WILLIAMS, COLERIDGE, and WIGHTMAN, Js.) for a cross rule (in the event of the defendants' rule being made absolute) to show cause why a new trial should not be had, on the ground that the defendants, at the trial, had not proved the act of bankruptcy. The fiat, appointment of assignees, and assignment to them, were proved; and WIGHTMAN, J., held that proof of an act of bankruptcy was unnecessary. The defendants had not had notice, under stat. 6 G. 4, c. 16, s. 90, to prove it; but such notice is not required where the question of bankruptcy arises incidentally. This appears from *Doe dem. Mawson v. Liston*, 4 Taunt. 741, decided on stat. 49 G. 3, c. 121, s. 10. *Lott v. Melville*, 3 Man. & G. 40, (see *Linnit v. Chaffers*, 4 Q. B. 762,) is also an authority for this application. In Archbold's Law and Practice in Bankruptcy, p. 409, (9th ed. it is treated as doubtful whether sect. 90 of stat. 6 G. 4, c. 16, is confined to cases where the character of assignees appears by the record, "or whether it extends to all cases where the plaintiffs or defendants are really assignees, and where, if notice had been given, they would be obliged to prove the petitioning creditor's debt, &c., in order to sustain their action or defence." [WIGHTMAN, J. The plaintiff here was aware that the defendants claimed as assignees; his counsel stated it in opening the case. Lord DENMAN, C. J. The principle of *Doe dem. Mawson v. Liston*, 4 Taunt. 741, is against you: the question there arose incidentally; here it arises directly.]

The court did not immediately decide upon the motion; but, in the latter part of the day, Lord DENMAN, C. J., said. We find, on referring to a book of practice, that the rule seems settled, and that, where a party knows that the bankruptcy will be relied upon, and gives no notice of dispute as to the proof, the opposite party may prove it by putting in the proceedings, though the right to the character of assignee is not brought in question by the record.

WIGHTMAN, J. In *Doe dem. Mawson v. Liston*, 4 Taunt. 741, the assignees, whose title came in question, were not parties to the record in any character.

Rule refused.

statute of Victoria, the words "before the bankruptcy," in stat. 6 G. 4, c. 16, s. 108, must be referred to the time of issuing the fiat.

The plaintiff cannot claim under the execution creditors by the assignments of September 15th and October 12th. He takes by the assignment for the benefit of creditors, made on the 15th of August. Having executed that assignment, he is estopped from saying that it is fraudulent and a nullity. This follows from the cases in which it has been decided that the party to an assignment in fraud of creditors cannot himself set it up as an act of bankruptcy: *Bamford v. Baron*, 2 T. R. 594, note (a), **Marshall v. Barkworth*, 4 B. & Ad. 508; *Tope v. Hockin*, 7 B. & C. 101; *Ex parte Caswell*, 19 Ves. 233. (*Knowles*. The defendants put in this deed; the plaintiff neither alleged it nor claimed under it.) A party must be taken to claim under a conveyance made to him. And the plaintiff acted upon the deed. [PATTESON, J. The party executing such a deed may avail himself of it for collateral purposes, when another produces it, though he cannot himself proceed upon it as an act of bankruptcy. He cannot assert, though for a different purpose from that of directly supporting the commission, that he committed a fraud in executing the deed. [PATTESON, J. In *Tappenden v. Burgess*, 4 East, 230, five persons sued as assignees of a bankrupt, four of them having executed an assignment which was the act of bankruptcy, but the fifth, Tappenden, who was the petitioning creditor, being no party to it; and this court held that the four might avail themselves of it in the cause, as joint assignees with Tappenden, though none of the four could have acted upon the deed as a petitioning creditor.] The only question there was, whether the petitioning creditor had a good act of bankruptcy to proceed upon. It did not appear in the present case who was the petitioning creditor. The plaintiff has taken successive assignments of the same property: but he cannot affirm that the first was inoperative: and, if so, the seizures, on which the other assignments depend, cannot avail him.

Cur. adv. vult.

Lord DENMAN, C. J., in the vacation following this term (June 27th,) delivered the judgment of the court. *After stating the facts as they are set out, p. 20, ante, his Lordship proceeded. [*28

For the defendants it was contended that the words in the seventy-second section of the Bankrupt Act, "at the time he becomes bankrupt," have reference to the time of the fiat, and not to the time of the act of bankruptcy, and that they were entitled to all the goods in question as being in the reputed ownership of the bankrupt with the consent of the plaintiff at the time of the fiat, it being admitted that, if the time be referable to the act of bankruptcy, they would not be entitled under that section.

We are, however, of opinion that the words "at the time he becomes bankrupt" have reference to the act of bankruptcy, and not to the time of the commission or fiat. This was indeed expressly so decided in *Lyon v. Weldon*, 2 Bing. 334, and *Smith v. Topping*, 5 B. & Ad. 674; and we

see no sufficient ground for putting a different construction on those words from that which they have uniformly received.

It was then contended by the assignees that the plaintiff never did acquire any property in the goods, for that he took them by assignment from the sheriff after an act of bankruptcy by Bradwell, of which the plaintiff was fully cognizant, and that, as against him, the property in the goods was by relation vested in the defendants at the time of the assignments by the sheriff.

The statutes which render dealings with persons who afterwards become bankrupt valid notwithstanding previous acts of bankruptcy do not protect or assist those who are cognizant of such previous acts of bankruptcy:

*29] *as against them the title of the assignees by relation to the time of the act of bankruptcy is available.

In the present case the defendants, the assignees, would be entitled to defeat the execution of any judgment creditor who had knowledge of the act of bankruptcy of the 15th of August, if the seizure under his writ was after the making the assignment on that day, but not if it was made before; for, if a seizure be made under an execution, (in a case not within the 108th section of the Bankrupt Act,) before the act of bankruptcy, it may be completed after. The seizure under the execution at the suit of the Low Moor Company was made *before* the act of bankruptcy, and the seizures under the three other executions were made *after* the act of bankruptcy. None of the execution creditors were shown to have had any notice of the act of bankruptcy of the 15th of August; but, if they had, the executions only of those in which the seizure was after the 15th of August could have been defeated by the defendants. That at the suit of the Low Moor Company would still have been available, as the seizure was before the act of bankruptcy. The plaintiff, who became assignee of the sheriff under all the executions, being aware of the act of bankruptcy of the 15th of August, knew that, if a fiat issued, the assignees would have a title by relation, and that he was taking an assignment of goods as being the goods of the bankrupt which might turn out, as far as respects the goods taken under the three last executions, to have been the goods of the assignees at the time of the seizure. A fiat has issued: and, though the execution creditors themselves, who knew nothing of the act of bankruptcy, nor that the goods might by relation be the property of any other persons than the bankrupt, *30] might be protected, the plaintiff, who became the assignee of the sheriff with full knowledge of the act of bankruptcy, is not; and we are of opinion that the defendants are entitled to retain all the goods, or the value of all the goods, which were assigned to the plaintiff under the three last executions; indeed to all the goods except so much as were assigned under the Low Moor execution, and were sufficient to satisfy that.

It appears to us that the plaintiff ought not to be in a worse situation than he would have been in had the Low Moor Company themselves been aware of the act of bankruptcy of the 15th of August; and, as the seizure was

before the act of bankruptcy, they might have completed the execution though having knowledge of that act of bankruptcy.

We are therefore of opinion that the verdict for the plaintiff should stand for the amount found to be the value of so much of the goods as were sufficient to satisfy the Low Moor Company's execution, and for that amount only.

Verdict to be reduced accordingly.

*LOCKWOOD v. WOOD. Feb. 4.

[*31

The word "toll" in a grant may include stallage.

And, if the crown grant to H. and his heirs that they may have and hold a market in the town of E., with all tolls and profits thence arising, but neither the crown nor H. has any right of soil in the town, if H. afterwards acquires the soil on which the market is held, he may claim stallage by virtue of the grant.

So held by the Court of Q. B. Judgment affirmed by the Court of Exchequer Chamber.

Held by the Court of Exchequer Chamber, that a modern grant by H. a subject, holding under the crown as before mentioned, to which certain persons, styled Inhabitants of E., are parties, granting that the said "Inhabitants of E.," their heirs and assigns for ever, shall enjoy the market as freely as H. held it of the crown, and containing a covenant by H. that they shall do so, does not exempt from stallage an inhabitant not privy to the parties to such grant.

Such an exemption for the inhabitants of a town, can be only by way of custom, not of grant or prescription.

Whether an exemption or discharge from toll, other than stallage, could be claimed by such grant or prescription for inhabitants generally, *quære*.

DEBT, for stallage duties and moneys due from and of right payable by defendant to plaintiff as the proprietor of a certain ancient market and market place, with the appurtenances, situate in the county of York, and of the stallage and other profits, privileges and emoluments thereto belonging and accruing therefrom, for and in respect of defendant having erected, put, placed and kept in the said market, and in and upon the market place of plaintiff, certain stalls, stands, caravans and carriages for the purpose of putting and placing and exposing to sale divers goods and chattels therein and thereon; and for and in respect of defendant having put and placed and exposed to sale therein and thereon divers goods and chattels to be sold in the said market and market place on divers days whereon the said market was held; and for and in respect of defendant having brought into the said market and exposed to sale therein divers other goods and chattels. Count on an account stated. Plea: Never indebted. Issue thereon.

On the trial, before PARKE, B., at the York Spring Assizes, 1839, the plaintiff gave in evidence letters patent of King Charles I., dated 6th August, 15 C. 1, (1639,) which, after reciting a previous inquisition on writ of ad *quod damnum, proceeded as follows. (a) Know ye that we, at the humble petition of our beloved the aforesaid George Hall, of our special grace, &c., have given and granted power, and, for ourselves, our heirs and successors, we do give and grant power, to the said George Hall,

(a) The original was in Latin. The above extract is from a translation used in the cause.

his heirs and assigns, that he and they in all time coming every year may have and hold, and may be able to have and hold, at the town of Easingwold in the county of York, one market on Friday each week; also two fairs or markets in the same place, one of which, &c. (stating the days on which they were to be held,) yearly: likewise another market for cattle or Friday every other week, to be begun, &c., and until, &c. (limiting the duration to a certain part of the year,) to be held yearly for ever; (a) with a court of pie-powder to be held at the time of the said fairs or markets, and with all tolls and profits thence arising and proceeding. And that the said George Hall and his heirs for ever may have, and may be able to enjoy, such and so great the same and similar a reasonable toll and profit in the market and fairs or markets aforesaid as are lawfully held and enjoyed in our town of Thirsk in the county aforesaid, for the tolls and profits of the markets and fairs and markets in the aforesaid town of Thirsk to be

*33] held, so however that the aforesaid markets and fairs or markets may not be to our loss or that of other neighbouring markets or fairs. Wherefore we will, and by these presents, for ourselves, our heirs and successors, we enjoin and command, that the aforesaid George Hall, his heirs and assigns, the aforesaid markets and fairs or markets at the aforesaid town fully and entirely on the feasts and days abovesaid, as it is observed annually, that they may have and hold, and may be able to have and hold for ever, along with all and every kind of toll and profit aforesaid thence proceeding and arising, and this without any molestation, &c. of us, our heirs and successors, &c.

The other material points in the evidence for the plaintiff were stated as follows in the judgment of the Court of Queen's Bench on the motion for a new trial.

"At the time of this grant the manor of Easingwold was not in the crown. It did not appear that George Hall, the grantee, was lord of the manor, or was seised or possessed of any land in Easingwold in which the market could be held. The plaintiff gave in evidence several conveyances of the market and fairs in Easingwold, and of places connected with the market, commencing in 1757, down to 1838, when they became vested in the plaintiff. In several of the conveyances the market place was distinctly named. The plaintiff proved, by evidence of living witnesses of early date, the perception of market tolls and also of stallage. It appeared from the evidence that the Easingwold people did not pay the common market toll: some evidence was given as to their not paying stallage; yet there was not perhaps sufficient evidence from that alone to infer an exemption from stallage."

(a) "*Cum curia pedis pulverizati, tempore eorundem feriarum sive nundinarum tenenda, ac cum omnibus tolneis et proficuis inde provenientihus et emergentibus. Et quod ipse Georgius Hall et hæredes sui in perpetuum habeant et gaudere possint tot, tanta et talia hujusmodi eadem et consimilia rationabilia tolneis et proficuis in mercatis, feriis sive nundinis predictis, quot, quanta et qualia legitimè habentur et percipiuntur in villa nostra de Thirsk in comitatu predicto, pro tolneis et proficuis mercatorum, feriarum et nundinarum in prædicta villa de Thirsk tenendarum. Ita tamen quod,*" &c.

The defendant's case was, that he, as an inhabitant of *Easingwold, was exempt from stallage: and, to prove this, he gave in [*34 evidence a deed, bearing date 31st August, 1646, between George Hall, the grantee abovementioned, of the one part, and William Marshall and others of the other part. The deed was as follows.

"This indenture, made the last day of August, A. D., 1646, and in the two-and-twentieth year," &c., (22 Ch. I.), "between George Hall, of Simington, in the county of York, gent., on the one part, and William Marshall, Richard Reynolds the younger, John Lindesley the younger, and John Cowpland, all of Easingwold, in the said county of York, yeomen, and bylawmen for this present year, 1646, for the said town of Easingwold, on the behalf of themselves and all the inhabitants of Easingwold aforesaid mentioned in a schedule hereunto annexed, by and with the consent and appointment of all the said inhabitants of Easingwold aforesaid on the other part, witnesseth that, whereas the said G. Hall did heretofore purchase of the King's Majesty that now is, one market on the Friday, in Easingwold aforesaid, in every week, and two fairs there, whereof one of them to be holden," &c., (naming the days,) "yearly and every year; and also one other market for cattle on Friday in every other week, to be holden," &c., (naming the times;) "together with a court of pie-powder: As in and by his Highness's letters patents, under the broad seal of England, bearing date at Cornbury, the 6th day of August," &c., (15 Cha. I.), "more plainly and at large it doth and may appear: Now these presents further witness that the said W. Marshall, R. R., J. L. and J. C., and the said inhabitants of Easingwold aforesaid, having taken into their consideration the great charge that the said G. Hall hath been at in procuring the *said market, and the great benefit it is like to bring to the inhabitants and [*35 their heirs in the said town of Easingwold in time to come, they have requested the said G. Hall that he will, at his further charge, build a fair toll booth or town house there, to be maintained at the charge of him, the said G. Hall, his heirs and assigns for ever, wherein the inhabitants and their heirs and assigns for ever may have their courts and bylaws and other meetings kept, without the let, contradiction or molestation of him the said G. Hall, his heirs or assigns, and also that the said G. Hall shall grant to the said inhabitants residing within the manor of Easingwold aforesaid, a free market to them and their heirs and assigns for ever for all manner of cattle and commodities whatsoever without paying any manner of toll for the same: In consideration whereof the said William Marshall, R. R., J. L. and J. C., and the aforesaid inhabitants, do hereby give and grant unto the said G. Hall, his heirs and assigns for ever, one little house standing in a street in Easingwold aforesaid called the Lowe Street, which house is commonly called the Court House, with the ground whereon it standeth, and also all such waste grounds adjoining to the market place as shall be needful for him to build upon for the advancing the

said market, together with the market place, the said wastes extending from the dennynge trough as the watercourse runs on the west of the market place to John Jarom's garth side, and on the east from the dennynge trough to the said John Jarom's garth side as the wain way goes to the Cucking Stool Hill. To have and to hold the said court house, and ground whereupon it standeth, the said market place, and other the wastes adjoining as

*36] aforesaid, to him the said G. Hall, *his heirs and assigns for ever, to his and their only proper use and behoof for ever, and for and to no other use, intent, or purpose whatsoever. And they further covenant to and with the said G. Hall that they the said W. Marshall, R. R., J. L. and J. C., and the rest of the inhabitants of Easingwold aforesaid, at their proper costs and charges, shall and will, within the term of nine months now next ensuing and following the date hereof, lead or cause to be led to the said market place, for the first paving thereof, so many stones as will sufficiently pave the same, and then he the said G. Hall, his heirs and assigns, to maintain the same for ever after. And the said G. Hall for himself, his heirs and assigns, doth hereby fully covenant, grant and agree to and with the said W. Marshall, R. R., J. L. and J. C., and the rest of the inhabitants aforesaid, their heirs and assigns for ever, that he the said G. Hall, his heirs or assigns, at his and their proper costs and charges, shall build the said toll booth or town house, containing ten yards long and six yards broad at the least, to the use of the inhabitants as well as himself, to go up one pair of stairs at the west end of the house or building of the said G. Hall which now is erected in the market place of Easingwold aforesaid; and that it shall and may be lawful for the said W. Marshall, R. R., J. L. and J. C., and the rest of the inhabitants aforesaid, their heirs and assigns for ever, to keep there the courts, bylaws, and public meetings for the townsmen for ever, without the let or molestation of him the said G. Hall, his heirs or assigns for ever; and that he the said G. Hall, his heirs or assigns, shall keep the said toll booth in good repair, with all manner of needful reparation at his costs and charges for evermore: And, lastly, doth covenant *37] that the said W. Marshall, R. R., J. L. and J. C., and the *rest of the inhabitants aforesaid, their heirs and assigns for ever, *shall have a free market within the said town of Easingwold, to buy and sell all manner of cattle and commodities whatsoever, toll free, in as ample manner and form as the said George Hall hath it by the recited letters patents* from his Majesty, without the lawful let, trouble, molestation, interruption or eviction of him the said G. Hall, his heirs or assigns, or any other person or persons lawfully claiming by, from or under him.

"In witness whereof the parties above said to these present indentures interchangeably have set their hands and seals the day and year first above written." Annexed to the deed was a schedule headed "The inhabitants of Easingwold," containing the names of one hundred and thirty-eight persons, male and female. Some signatures were in the following form.

“Hered. Francis Easterby.” All the women styled themselves “vid.” (widow.) It appeared by endorsement on the deed,^(a) that livary of seisin was given by Marshall, Reynolds, Lindsley and Coupland, with the consent of the subscribing inhabitants.

The defendant alleged that this deed created an exemption from stallage as well as from market tolls: the plaintiff contended that it took effect only as to the common market tolls. The learned judge reserved the point: and a verdict was found for the plaintiff on the first issue, as to stallage, and for the defendant as to the residue of the issues.

Alexander, in Easter term, 1839, obtained a rule to show cause why a nonsuit should not be entered, or a general verdict for the defendant. In Michaelmas term, 1840,^(b)

**Cresswell*, *Tomlinson*, and *Raines* showed cause. First. The grant of exemption from toll contained in this deed does not carry [*38 an exemption from stallage. Secondly. If this is a grant made to the inhabitants of a town as a class, it is void, because they have no capacity to take, unless incorporated: if it is relied upon as a grant to the individuals who subscribed the deed, their heirs and assigns, the answer is that the defendant here was not proved to be heir or assign of any such person. (The argument on the capacity of the inhabitants to take was not fully gone into, the court directing the attention of counsel principally to the first point.) Nothing can turn upon the grant of 1639; the king at that time had not the soil, and therefore could not grant any right in respect of stallage, though he might grant toll. So the crown may create a port, but cannot grant the privilege of unloading on the bank, if it be the land of a subject; *Hale*, *De Portibus*, p. 73; part 2, c. 6, *Harg. L. Tracts*, 73.^(c) The whole question, therefore, arises on the deed of 1646; and the words there, “a free market,” “to buy and sell,” &c., “toll free, in as ample manner and form as the said George Hall hath it by the recited letters patents,” would not, by force of the terms used, give an exemption from stallage, even if the crown had had the soil at the time of granting the letters patent. Stallage is in the nature of a rent for use and occupation of the soil, and, as an incident to the soil, is distinguished from toll in *Heddey v. Welhouse*, *Moore*, 474. If it is in any sense a toll, it is a toll sui generis, as is explained in *The Mayor, &c. of Northampton v. Ward*, 1 Wils. 107, S. C. 2 Stra. 1238. [Lord *DENMAN, C. J., mentioned *Bennington v. Taylor*, 2 Lutw. 1517.] In that case it certainly was [*39 said by the court that “tolnetum” may signify stallage, as a general word for such duties and payments; but there the defendant justified under a prescription to take “rationabile tolnetum” “pro qualibet duplici stallâ,” &c.; and, the question being, on motion in arrest of judgment, whether the prescription had been laid in proper words, (the right itself being established,)

(a) More fully stated, p. 51, post.

(b) November 21st. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Ja.

(c) See *Mayor of Exeter v. Warren*, 5 Q. B. 773.

it was held that the meaning was sufficiently clear, though the plaintiff had used the word "toll" to describe stallage. That proves nothing decisive of the present case. In *The Mayor, &c. of Norwich v. Swan*, 2 W. Bla 1116, it was laid down that "right of market and right of soil are things totally distinct," that "toll" could not be due for setting forth tables in a market, and that "no man can erect stalls in a market, without leave of the owner of the soil." In *Mayor, &c. of Newport v. Saunders*, 3 B. & Ad. 411, LITTLEDALE, J., said, that "stallage is a satisfaction to the owner of the soil for the liberty of placing a stall upon it;" and he treated the action of assumpsit for this duty as analogous to that of use and occupation for the enjoyment of premises. The original grant here gave to George Hall a right to hold a market in the town of Easingwold, not limiting him to any particular spot. If he afterwards acquired a property in land on which the market was held, he would then be entitled to stallage on that land, as well as tolls; till then, the right of stallage would shift according to the ownership of the soil used for the market.

Alexander and Knowles, contra, relied, in the first place, upon parts of *40] the evidence (not stated in this *report) as showing, by practice subsequent to the grant of 1646, how the term "toll free" had been understood. Then, as to the legal meaning of the word "toll," the authorities show that it was construed as including stallage in times not distant from that of the grant by Hall. In *Rez v. Corporation of Maidenhead*, Palm. 76, 86, it was stated in argument, and seems to have been admitted by the court, that piccage and stallage are of the nature of toll, and discharge of all manner of toll is discharge of piccage and stallage. *Bennington v. Taylor*, 2 Lutw. 1517, and *Hickman's Case*, 2 Roll. Abr. 123, tit. *Market*, (B) pl. 2, there cited, (and referred to in 15 Vin. Abr. 245, tit. *Market*, (B) pl. 2,) show clearly, that in pleading a prescription, the word "toll" may cover stallage. That also appears by the definition of "toll to the fair or market" in 2 Inst. 220: and in Com. Dig. *Market*, (F 1,) stallage is treated as toll. It may be said that Hall's covenant to the inhabitants, that they "shall have a free market" "to buy and sell," &c. "toll free," is restrained by the subsequent words "in as ample manner and form as the said George Hall hath it by the recited letters patents." But a general covenant in a deed is not to be contracted in its operation by a preceding or subsequent clause, unless the intention so to restrict it should appear by irresistible inference; *Hesse v. Stevenson*, 3 B. & P. 565; *Howell v. Richards*, 11 East, 633. To limit a general covenant in this manner, there should appear "something to connect it with a restrictive covenant," or else "words in the covenant itself amounting to a qualification;" *Smith* *41] *v. Compton*, 3 B. & Ad. 189, 200. Nothing in this deed *prevents the supposition that Hall granted to the inhabitants more than he took from the crown. The contract on their part is not likely to have been made for a less consideration than the freedom of selling as well as buying. The grant of liberty to "sell" must have some operation; and it has none,

unless freedom from stallage be granted, the owner of goods not being liable in other respects for merely going into the market to sell. The words "in as ample manner and form as the said George Hall hath it by the recited letters patents" must be referred merely to the amount of privilege which Hall did take by the patent. The term "eviction" seems pointed at some interest in the land. If, therefore, the authorities go no farther than to show that "toll" may include stallage, it must be taken to do so here.

Cur. adv. vult.

LORD DENMAN, C. J., in Hilary vacation, (February 4th,) 1841, delivered the judgment of the court.

After giving the substance of the pleadings and the charter of Charles I., his lordship stated the result of the evidence for the plaintiff, as at p. 33, *antè*. He then continued as follows.

On the part of the defendant, after a notice having been given to produce the original deed creating an exemption from toll, and it not being produced, secondary evidence of its contents was given by a copy which was handed up to us. It appears to be an indenture of the last day of August, 1646, between George Hall of the one part, and William Marshall and three others, by the name "of Easingwold" and "by law men" of Easingwold, on behalf of themselves and all the inhabitants of *Easingwold mentioned in the schedule thereto annexed, by and with the consent and [*42 approbation of all the said inhabitants of Easingwold, of the other part. And, after reciting, &c. (His lordship here stated the substance of the deed.) That deed was signed by one hundred and thirty or one hundred and forty inhabitants of Easingwold, and signed and sealed by Marshall and the three other persons, and livery of seisin given of part of the premises in the name of the whole by Marshall and the three other persons, by and with the consent of the inhabitants within named, in the presence of twelve witnesses.

My brother PARKE was of opinion that the said deed did not exempt the inhabitants from this claim for stallage. There was a question as to part of the evidence to be left to the jury, which is immaterial as to this point. The point was reserved by my brother PARKE as to the exemption from stallage, with liberty to turn it into a special verdict if the court thought fit. The jury found a verdict for the plaintiff, damages 1s., as far as relates to the stallage.

The question to be decided as to the effect of the deed by which the exemption is created is, whether it be merely an exemption from the common market tolls, or whether it extends also to stallage. The words of the grant of Charles I. are, that Hall may have and hold in the town of Easingwold the markets and fairs there mentioned, together with a court of piepowder, and with all the tolls and profits thereof coming and arising; and that Hall might take such tolls and profits there as were had and taken in the town of Thirsk. We will first consider what is the general meaning of the word "toll" as applicable to fairs and markets.

In the Second Institute, p. 220, on the Statute of *Westminster [*43

the First, 3 ed. 1, c. 31, which was on the subject of outrageous tolls, Lord COKE says, "Toll to the fair or market is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, piccage, or the like."

This opinion of Lord COKE has received judicial confirmation in the case of *Bennington v. Taylor*, 2 Lutw. 1517, which was an action of trespass for seizing goods. The defendant there pleaded that the Dean and Chapter of the Cathedral Church of Peterborough were seised of a manor, and prescribed for a fair, and to have and take the reasonable toll, to wit, among other things, for every double or large stall called a double covered stall, and for the ground about and near the stall and occupied with it, 1s.; and, in default of payment upon demand, to distrain for it. Issue was joined on the prescription. After a verdict for the defendant, several exceptions were taken in arrest of judgment. The prescription was that the dean and chapter had a reasonable toll, to wit, among other things, for every double stall, &c., and for the ground and soil occupied with it, 12d.: and toll and stallage are two different things; and therefore all that comes under the videlicet is repugnant and void. But the exceptions in this case were not allowed, because toll may well signify stallage as a general word for such duties or payments. And Justice POWELL cited *Hickman's Case*, 2 Roll. Abr. 123, tit. *Market*, (B) pl. 2, where it is said, the lord of the manor may prescribe to have the eighth part of a bushel of corn in four bushels, brought to market in the manor, by name of toll, for stallage, sold or not sold, and that "that is a good prescription, although it be to have it *44] in specie. There were other objections made to the plea, which were overruled, and judgment was given for the defendant by the whole court.

In the course of the argument a case was cited from *Palmer(a)* which was a quo warranto against a corporation for claiming certain franchises and privileges; a market every Monday; piccage, stallage, toll, &c.; they pleaded there had been an ancient bridge near the town which had been repaired time out of mind by a fraternity which had been dissolved, and that the king, in consideration that the corporation would repair the bridge, granted to them a market with piccage and stallage, toll, &c., under which, &c.: and to which plea there was a demurrer, which was argued by several counsel on both sides: and, although a great deal of learning is displayed on a variety of matters connected with fairs, markets, piccage and stallage and tolls, none of them bear on the present case until the end of the report, when, the counsel having objected that piccage and stallage are not due of common right, and therefore there ought to have been a sum certain for them, the counsel on the other side answered that they are of the nature of toll, and a discharge of all manner of toll is a discharge of piccage and stallage; and that appears, because, in a grant, by the words cum omnibus libertatibus et liberis consuetudinibus, (b) piccage and stallage are granted,

(a) *Rez v. Corporation of Maidenhead*, Palm. 76.

(b) See *The Earl of Egremont v. Saul*, 6 A. & E. 924.

as appears by a charter enrolled, 15 R. 2, by a grant to the Bishop of Salisbury, 1 E. 3, and a grant to the Prince of Wales, 5 E. 4: and this case is stronger because the piccage and stallage are mentioned *by special name. The court gave no judgment as to the point now under [*45 discussion, nor could they, because piccage and stallage are distinctly mentioned in the pleadings.

Another case was also cited, *Heddey v. Welhouse*, Moore, 474, S. C. Cro. Eliz. 558, 591, (a) to show that toll and stallage were different things. The counsel put four things for the consideration of the court: but the judges only decided on one; that toll was not incident to a fair of common right, and that no one shall have toll in a fair, except by grant or prescription; and, the toll there not being by grant or prescription, they shall not have toll: and, note, in the argument of this case the judges held that the king may grant toll with a new fair, if the toll be reasonable and not excessive, but a penny for a beast they held unreasonable: and he may grant pontage and murage to be taken by him who erects a new bridge or wall, because it is for the ease of the people; but that toll is payable of common right only for live cattle, and not for victuals or other wares, (rather a singular position perhaps;) that for that the lord is satisfied in the stallage and piccage: and they held that stallage and piccage is incident to the soil; and therefore, if the king grants a market with toll certain to one and his heirs to hold in land which is borough English, and the grantee dies, the heir at common law shall have the fair and market and the toll, but the younger son shall have the piccage and stallage with the soil.

In Brooke's Abridgment, Part 2, 258 b, tit. *Toll*, pl. 2, it is said that by common law a man shall pay toll for nothing *brought into a fair but for things sold; but by custom he may pay for every thing brought [*46 into the fair, and he shall pay for his place and his stand although he sell nothing.

It may be said that these cases in Moore and Brooke's Abridgment show that toll and stallage are different things, and unless the owner of the fair or market has the soil either as freehold or in possession he cannot claim stallage. But the question here is, whether a grant or exemption of the general word "toll" is sufficient to exempt from market toll and also stallage. The first was considered in *Bennington v. Taylor*, 2 Lutw. 1517; and the above case of *Heddey v. Welhouse*, Moore, 474, S. C. Cro. Eliz. 558, 591, and the case in Rolle's Abridgment (b) were cited; the court held the general word "toll" included stallage; and we also come to the same conclusion.

Then how does this apply to the present case? It is said that the manor of Easingwold was not in the crown at the time of the grant of Charles the First: and we think that quite immaterial; the manor being or not in the crown could not affect the grant of the fair or market unless the crown had

(a) See, as to this case, *Wright v. Bruster*, 4 B. & Ad. 116, 117.

(b) *Hickman's Case*, 2 Roll. Ab. 123, tit. *Market*, (B) pl. 2.

assigned to Hall a place on which to hold the fairs and markets. The words of the charter are with the "profits thence arising and proceeding;" but Hall could not claim stallage unless he had a place to hold the markets and fairs either by gift of the crown, or by having the manor and as such having a general range of places to hold the fair and market, or by having land either freehold or otherwise in it, in any of which cases he could claim *47] stallage at whatever time after the charter "of the crown he should become interested in the lands. If he never was so interested, he might nevertheless hold the fairs and markets on land belonging to other persons by their mere sufferance and permission: but unless he had the actual possession of it he could not claim stallage. But, if at any time after the charter of the crown he should become seised in fee of any land, and hold his fair and market there, he might grant an exemption as well of common market toll as of stallage, which would bind those who claimed the land under him.

The deed of 1646 explains the relative situation in which all these parties stood. We collect from the deed that the inhabitants of Easingwold were the beneficial owners of the market place and premises adjoining; but as inhabitants they could have no legal interest; the powers of ownership were exercised by the public officers of the town with their assent; the bargain is then entered into by them and Hall, that, for the reasons and under the circumstances stated in the deed, they should convey the market place and premises adjacent to Hall, and he in return should grant them the exemption mentioned in it. Then, to carry this arrangement into effect, the bylaw men with the assent of one hundred and thirty or one hundred and forty inhabitants enfeoff Hall of this market place and the adjoining premises, and livery of seisin is given. We say enfeoff, because the words "give and grant" to a man and his heirs are of the same effect as the word "enfeoff;" and, according to Co. Lit. 9 a, they are more ancient words to denote a conveyance than the word "enfeoff." See also upon this point *Stampe v. Burgesse*, 2 Roll. Rep. 73. The inhabitants of *Easingwold must *48] certainly have meant that if they were to have an exemption at all they were to have it for a charge which arose out of the land they had given up to Hall, and which they had retained in their own possession, and which would have relieved them from the payment of stallage themselves, and would also entitle them to claim a compensation from Hall for the privilege of holding his fairs and markets there.

Although such may have been the intention of the inhabitants of Easingwold, has that been carried into effect? The recital in the deed states that Hall was to grant to the inhabitants of Easingwold a free market for all manner of cattle and commodities whatever, without paying any manner of toll: and the grant of exemption in the latter part of the deed is, that the inhabitants and their heirs and assigns "shall have a free market within the said town of Easingwold, to buy and sell all manner of cattle and commodities whatsoever, toll free, in as ample manner and form as the said

George Hall hath it by the recited letters patents from his majesty, without the lawful letth of him or any other. The toll which Hall had under the letters patent, we are of opinion, as we have expressed before, included stallage; that is, although he had it not at the time of the grant from the crown from the want of his having the land where the markets and fairs were held, yet he would have the right to the stallage when he got the land; and, as the accession of the land to Hall and the grant of exemption by him were simultaneous acts by the same deed, founded on the consideration there mentioned, we think it has the same effect as if he had acquired the market place, &c., at the time prior to the grant of exemption including stallage.

*And, as the plaintiff in this case claims under Hall, in the view we have above taken of the case we should have thought the rule [49] should be made absolute to enter a verdict for the defendant; but, in showing cause against this present rule, the counsel for the plaintiff contended that, if the effect of the deed was to grant exemption to the inhabitants of Easingwold generally, they were not such a description of persons as could claim the exemption as such, and that, on the other hand, if the effect of the deed was not to grant exemption to the inhabitants generally, but was confined to the persons whose names were mentioned in the schedule, their heirs and assigns, there was no evidence that the defendant was either heir or assign of any of those persons. None of these points were considered at the trial. As this application is not for a new trial, but for a verdict to be entered for the defendant, the plaintiff has a fair ground to contend that he has a right to the opinion of the judge at the trial on matter of law, and of a jury as to the matters of fact, which may arise out of this question: and therefore we think we cannot, in the present state of things, direct that a verdict should be entered for the defendant, but that there ought to be a new trial.

Rule absolute for a new trial

*IN THE EXCHEQUER CHAMBER.

[50]

(Error from the Queen's Bench.)

LOCKWOOD *v.* WOOD. *April 23.*

See marginal note, p. 31, ante.

THIS cause was again tried, before Lord DENMAN, C. J., at the Yorkshire Summer assizes, 1841; when his lordship directed a verdict for the defendant; upon which direction a bill of exceptions was tendered.

The bill stated that the plaintiff gave in evidence the grant by letters patent of 6th August, 15 C. 1, (which were set out in the original Latin;) and also gave evidence that the manor and lands of Easingwold did not, at the time of making the grant, or at any time since, belong to the crown:

that he further proved deeds of conveyance of the market, fair, market place, lands, edifices and buildings to himself and his heirs, tracing the title in fee simple from 1757, and gave evidence of ownership by the parties to whom the conveyances were respectively made. The bill of exceptions then alleged that the counsel for Lockwood also called "witnesses who proved, (among other things,) the receipt and perception, as far back as living memory went, by the said W. Lockwood and those under whom he claimed, of tolls, and stallage, or a compensation for the liberty of placing stalls and other things on the ground and soil of such market on the days when such market and fairs were holden, from divers persons not being inhabitants of the township and manor of Easingwold; and that the same did not exceed the *payments for tolls and stallage, respectively, which *51] had been and were received in the market of Thirsk." That Lockwood's counsel also called witnesses "who gave evidence that payments had from time to time been made to the owners of the market place of Easingwold, by inhabitants of Easingwold, for whom such owners provided stalls, set up by such inhabitants in the market place on market days and fair days, such payments being proportioned to the length of the stall, but being three or four times as much on fair days as on market days; which stalls were kept and taken care of for them by the owners of the market place in the toll booth in the intervals between market days and fair days; and that such persons kept their own places in the market place and paid more for some situations than others." That the counsel for Lockwood also proved that stallage had been demanded of Wood, and payment refused by him.

The bill further stated that the defendant's counsel produced the deed of 31st August, 1646, which was set out, with the schedule of names, as stated in the judgment of the Court of Queen's Bench. "And on which said deed was endorsed a memorandum, of livery and seisin of the house called the Court House therein named, in the name of all the premises therein mentioned, in these words, to wit, 'sealed and delivered, and also quiet and peaceable possession and livery and seisin given to the within named George Hall of the house called the Court House, in name of all the premises within written, by the within named William Marshall, Richard Reynolds the younger, John Lindsey the younger, and John Cowpland, by and with the consent of the inhabitants within named, the day and year *52] *within written, in the presence of us whose names are subscribed.' And thereunder were certain names subscribed. And it was further, among other things, proved that the said markets of Easingwold had, from as far back as living memory went, been, and were, held in the place named in the said deed for the holding of such markets, the same being an open and unenclosed public place, partly paved, in the town of Easingwold, as described in the said deed: and that the said toll-house or booth, during all the time aforesaid, had been and then was used by the inhabitants of Easingwold for the public meetings of the said town when occasion required:

and no evidence was given of the payment of any rent or acknowledgment for such use of the same; the key of the said booth being kept by the said W. Lockwood and those under whom he claimed, who had sometimes let the use of the booth as a dissenters' meeting room, as a place for public exhibitions, and for other purposes, and received rent or payment for such uses of the booth. It was proved that part of the space below the booth was used by the said W. Lockwood and those under whom he claimed, as a place for the deposit of stalls let out to hire by them, to be used on market days and fair days for exposing goods to sale thereon in such market place, by persons requiring the use of such stalls for that purpose. It was proved that another part of the space below was used as a saddler's shop, and that the rents of that shop, and of certain shambles and other buildings standing on the said market place, had been received by the said W. Lockwood and those under whom he claimed, and the repairs of the booth and the market place done by him and those through whom he claims; and that the said James Wood was, and *had been for twelve years last past, an inhabitant of the said town and manor of Easingwold, and [*53 the occupier of a small house and farm there within the said town and within the manor of Easingwold. But no evidence was given, and it was admitted by the counsel for the said James Wood that he could give no evidence, to connect the said J. Wood with the said deed, nor to prove him to be heir or assignee of any of the persons named in the said deed, except the proof of the fact that he had been, and was, such inhabitant, and such occupier of the said house and farm: but no evidence was given that the same had ever belonged to, or been occupied by, any of the persons named in the said deed or the schedule thereto. And it was also, among other things, in evidence, on the part of the said J. Wood, that the inhabitants of Easingwold, from as far as living witnesses could recollect continually hitherto, had used and enjoyed the said market to buy and sell all cattle and commodities whatsoever toll free. And the counsel for the said J. Wood also called divers witnesses who gave evidence that, from as far back as such witnesses could recollect, continually hitherto, inhabitants of Easingwold, providing and keeping their own stalls used by them on the market place for buying and selling all manner of commodities there, had made no payments to the owners of the market place for the use or occupation of the market by such stalls, nor any other payments whatsoever; and that, in several instances before the present claim, claims for stallage had been made by the owners of the market place from such inhabitants, and in all those instances such claims had been resisted, and had not been persisted in, such inhabitants claiming to *use the market, and place [*54 their own stalls there, free from all manner of payments."

The bill then, after stating the points pressed upon the lord chief justice by the respective counsel, described his lordship's ruling upon them as follows. "And the said chief justice did then and there declare his opinion to the jury aforesaid, that the right to stallage was in the nature of rent and

that the owner of land was entitled thereto, unless prevented by particular circumstances; that, in this case, George Hall, the grantee of the market, had no title to the land but by the charter, and by the deed put in on behalf of the said James Wood; that the land and soil of the market place vested in him the said George Hall, with an exemption of the inhabitants of Easingwold from any sort of payment for the use of the said market and market place; that he, the said chief justice, was of opinion that stallage was included within the terms of the said exemption; and that the said J. Wood, an inhabitant of the town of Easingwold, was entitled to such exemption. And the said chief justice therefore directed the said jury that the said deed and matters aforesaid were a bar to the said action of the said William Lockwood, and directed the said jury to give their verdict for the said J. Wood. Whereupon the said counsel for the said William Lockwood did then and there, on the behalf of the said W. L., except to the aforesaid direction and opinion of the said chief justice, and insist that the said deed and matters aforesaid were no bar to the said action, and that the said W. L. was, upon the evidence aforesaid, notwithstanding the said deed and matters aforesaid proved by the counsel for the said J. Wood, entitled to a verdict for the amount of the value of stallage aforesaid for the *aforesaid use of the aforesaid market place by the said James

*55] Wood." And that the jury found a verdict for the defendant Wood, under the above direction.

Judgment having been entered for the defendant in the Court of Queen's Bench, error was brought in the Exchequer Chamber. The case was argued in Trinity vacation, 1843,(a) before TINDAL, C. J., COLTMAN, ERSKINE, and MAULE, Js., and PARKE, B., and in Michaelmas vacation, 1843,(b) before TINDAL, C. J., COLTMAN, ERSKINE, and MAULE, Js., and GURNEY, B.

Erle, for the plaintiff in error, (the plaintiff below.) The inhabitants, as such, could not take by the deed. They are not incorporated; and it is not shown that the parties now insisting on the grant are privies to the original parties. "The parishioners or inhabitants, or *probi homines* of Dale, or the churchwardens, are not capable to purchase lands;" Co. Lit. 3 a. Such a privilege might exist by custom, but not by grant, for it cannot be prescribed for; *Day v. Savadge*, Hob. 85, (5th ed.) first point; and prescription supposes a grant. And, conformably with this rule, in the case of custom, the right must be laid in the land; in that of prescription or grant, it must be laid in the persons; *Gateward's Case*, 6 Rep. 59 b, S. C. as *Smith v. Gatewood*, Cro. Jac. 152. It seems to have been otherwise where the grant proceeded from the crown: but that was because a grant from the crown to the inhabitants of a place made them a corporation, *eo intuitu* only; **Anonymous Case* in 1 Dyer, 100 a, pl. 70. In

*56]

(a) June 17th.

(b) November 27th. The argument was taken before five judges, by consent of counsel, on each day.

Com. Dig., *Capacity*, (B 1,) the doctrine laid down in Co. Lit. 3 a, is adopted. In an *Anonymous Case*, in the Year-book of 10 Henry 4, fol. 3 B., pl. 5, it is laid down: "Si terre soit done *parochianis talis Ecclesiæ ad inveniendum unum presbiterum vel hujusmodi*, &c. le done ne vault riens, pur ceo que il n'ad ascun chose corporate, que puit prender estate." It cannot be said that this grant is to operate by way of exception from the thing granted; for it does not appear that the inhabitants, as such, ever possessed the land. And an exception can only be of part of what is granted; and therefore an incorporeal easement cannot arise by way of an exception out of a grant of land; *Doe dem. Douglas v. Lock*, 2 A. & E. 705, 743. Nor can this distinct privilege be a reservation: it is a new grant; *Wickham v. Hawker*, 7 M. & W. 63.(a)

(He then argued as to the effect of the words of the grant, supposing it valid: but on this point it is sufficient to refer to the arguments in the court below.(b))

Knowles, contrà. As to the first point. The modern law is laid down in the authorities cited. But anciently the doctrine was not so strict. A custom might originate in a grant. In *Fitch v. Rawling*, 2 H. Bl. 393, it was held that a custom for all the inhabitants of a parish to play at all lawful sports in the close of A. was good; and *HEATH, J.*, *said that the lord might have granted such a privilege before the time of memory. [*57 In *Rez v. Mashiter*, 6 A. & E. 153, it was granted by charter to the inhabitants of a manor that they might elect a justice. In *Tyson v. Smith*, 9 A. & E. 406, in Exch. Ch.; affirming the judgment of the Court of Q. B., *Tyson v. Smith*, 6 A. & E. 745, it certainly appears to have been intimated from the bench, during the argument, 9 A. & E. 417, that a custom could not originate in a grant, for that a grant would make a prescription. But that seems to go too far. And the authorities cited on the other side do not relate to an easement: they show only that an interest in land cannot pass to inhabitants as such. That is the language in Co. Litt. 3 a. *Day v. Savadge*, Hob. 85, contains nothing inconsistent with this: the language there used shows only that a plea of discharge by freemen generally must be by way of custom, not prescription. The effect of *Smith v. Gatewood*, Cro. Jac. 152, S. C. as *Gateward's Case*, 6 Rep. 59 b, is that inhabitants, unless incorporated, cannot prescribe for profit, but may prescribe for easement. This is an easement. The *Anonymous Case* in 1 Dyer, 100 a, pl. 70, applies only to grants of land. In *Rez v. Mashiter*, 6 A. & E. 165, *LITLEDAL, J.*, said, of the word *inhabitants*, that "in the grant of a way over a field to church it would extend to all persons in the parish." In *Abbot v. Weekly*, 1 Lev. 176, the court seems to have doubted whether an easement for all the inhabitants of a vill to dance in the plaintiff's close was

(a) And see *The Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 940.

(b) The following additional authorities were cited: *Lord Middleton v. Lambert*, 1 A. & E. 401; and (chiefly as to the propriety of explaining the deed by evidence of usage, or other extrinsic matter) *Withnell v. Gartham*, 6 T. R. 398; *Rez v. Mashiter*, 6 A. & E. 153; *Jewison v. Dyson*, 9 M. & W. 541; *Mosley v. Motteux*, 10 M. & W. 533.

laid ill, though pleaded by way of prescription. In *Fozall v. Venables*, Cro. Eliz. 180, a question arose whether inhabitants could prescribe for matter of interest, or could *do so only in the case of an easement: *58] there the court appears to have been divided. Afterwards, in *Baker v. Brereman*, Cro. Car. 418, all the court held "that inhabitants may allege prescription for a way to a church or market, which are of necessity, and in matter of discharge, as in modo decimandi, or to be quit of toll; but not in matter of profit or charge in another soil." That case is precisely in point. *Shelton v. Montague*, Hob. 118, is to the same effect: and there the court collected that the prescription set up (for a modus) was matter of discharge. But, further, the inhabitants here may well have excepted something to which they had a right out of the grant to Hall. Hall would be estopped from denying that they had not a right in what they granted to him, or what they professed to except as part of the same thing. Or the grant of the privilege may be treated as a condition under which Hall took. And it may even be contended that the defendant may represent some of the individuals who were parties to the deed, though the mesne assignments were not traced. (He also argued on the other points.(a))

Erle in reply. This professes to be a grant; it has not the character of a discharge: and the only question is, whether it could operate to transfer from Hall to the inhabitants at large that which he took by the grant from the crown. The cases cited on the other side show little more than the anxiety of the courts to support, quâcunque viâ, what appeared to have prevailed for a long time. Some of the decisions relate to matter *sui *59] generis. Thus *Shelton v. Montague*, Hob. 118, though said to relate to a discharge, in fact arose upon the question what the parson was to receive. *Baker v. Brereman*, Cro. Car. 418, related to a way, which may be dedicated to the public. As to title in the defendant through parties to the deed, no proof of such a fact was offered.

TINDAL, C. J., in last Easter term, (April 23d, 1844,) delivered the judgment of the court.

This was a bill of exceptions tendered by the plaintiff below, (who is also the plaintiff in the Court of Error,) against the direction of Lord DENMAN at the trial of the cause at the assizes holden for the county of York, in the autumn of the year 1841. The plaintiff declared in debt for stallage duties due and payable to him as the proprietor of a certain market and market place in the county of York, to which declaration the defendant pleaded the plea of "Never indebted."

At the trial, the plaintiff gave evidence (amongst other things) of the grant, by King Charles the First, in the fifteenth year of his reign, to one George Hall and his heirs, of a weekly market and two fairs in the year at Easingwold, in the county of York, with certain specified tolls and profits: he also proved the seisin in fee of the plaintiff in the said market and fairs and the tolls and profits thereof, and the seisin of the plaintiff in his demesne

as of fee of the soil and freehold of the market place at Easingwold, and the user of the market by the defendant by placing a stall upon the market place on several market days; the defendant being, as proved by the plaintiff, an inhabitant of the township of Easingwold.

*The defendant, on the other hand, gave in evidence a certain deed, bearing date the 31st August, 1646, being made between the [*60 said George Hall, the grantee of the said market, of the one part, and four persons therein named of the other part, who are therein described as "of Easingwold," "yeomen, and bylaw men for this present year, 1646, for the said town of Easingwold, on the behalf of themselves and all the inhabitants of Easingwold aforesaid mentioned in a schedule hereunto annexed, by and with the consent and appointment of all the said inhabitants of Easingwold aforesaid;" the schedule thereto annexed being headed with the words "Inhabitants of Easingwold," and containing considerably more than one hundred names subjoined thereto. By that deed the four bylaw men and the rest of the inhabitants do give and grant to George Hall, his heirs and assigns for ever, (amongst other things,) the market place at Easingwold, as described therein by certain metes and bounds. And the said George Hall thereby covenants, (amongst other things,) that the four bylaw men "and the rest of the inhabitants aforesaid, their heirs and assigns for ever, shall have a free market within the said town of Easingwold, to buy and sell all manner of cattle and commodities whatsoever, toll free, in as ample manner and form as the said George Hall hath it by the recited letters patents." There is upon the back of the deed an endorsement of livery and seisin having been given to George Hall of the premises described in the deed by the four bylaw men by and with the consent of the inhabitants within named.

It is unnecessary to advert to any other part of the evidence given by the defendant at the trial, as the whole question which has been raised before us turns *upon the legal effect and operation of that deed. At the trial the defendant's counsel insisted that the deed and other [*61 matters given in evidence amounted to a bar of the plaintiff's claim; whilst the plaintiff's counsel, on the other hand, insisted that the deed contained a grant of an exemption from tolls only, and not from stallage, and that stallage was not included in the terms of the grant; and further insisted that, even if stallage was included within the terms of the exemption, the defendant, not being one of the grantees, nor the heir or assignee of any of the grantees therein named, could not take the benefit thereof as an inhabitant of Easingwold, as such inhabitants were not incorporated; and, therefore, he contended, the deed ought not to be admitted as a bar to the plaintiff's right of action. The lord chief justice thereupon told the jury that he was of opinion that stallage was included within the terms of the exemption, and that the defendant, as an inhabitant of the town of Easingwold, was entitled to such exemption, and directed the jury that the

deed and matters aforesaid were a bar to the plaintiff's action. The plaintiff's counsel then excepted to each of those points so ruled by the lord chief justice; and the question before us is, whether such ruling as to both those points is or is not consistent with law.

It is to be observed that the present cause had been already, in a former stage of the proceedings, before the Court of Queen's Bench upon a motion for a new trial, and that, upon the arguments brought before the court on that occasion, the same two points were made by the counsel for the plaintiff below, which form the ground of the present exceptions; and that the Court of Queen's Bench, after time taken to consider, in a very learned *62] judgment, in which the principal authorities are reviewed and discussed, declared their opinion upon the first point to be, that the exemption from toll mentioned in the deed included an exemption from stallage also. After that judgment it is unnecessary for us to say more than that we entirely concur therein, and in the reasonings by which it is supported; and consequently we hold that the exception first tendered to the direction of the learned judge at the trial is untenable.

With regard to the second point, viz. whether the inhabitants of Easingwold could claim an exemption from stallage under the description contained in the deed, the Court of Queen's Bench appear to have studiously abstained from giving any opinion; and both that court and the lord chief justice at the trial have been desirous that such question should be put upon the record for the purpose of a more formal discussion; which has accordingly been done by the course taken at the trial. And we therefore proceed to consider this second ground of objection, as one which is altogether open, and unfettered by the authority of the court below.

And upon this point we are of opinion that, under the grant in question, a modern grant, not made by the crown but by a subject, inhabitants cannot take by that name or description such an easement as that which is now under consideration, that is, a right to place their stalls on market days in alieno solo without making any payment for the same.

It was admitted, on the argument before us, that inhabitants cannot take land by that description in a modern deed. Indeed the authority of Co. Litt., 3 a, is express to that point. For, although it is added there, apparently by way of exception, "unless it were in ancient *63] time when such grants were allowed," yet that exception would probably be found to be confined to grants by the crown, and to stand upon the reason stated in *Anon.* 1 Dyer's Rep. 100 a, pl. 70, that, if the queen grants land by her charter to her good men of the town of Islington, without saying to them and their heirs, or to them and their successors, rendering a rent, it is a good corporation perpetual, to that extent only and no other because that a rent is reserved, &c. But the argument on the part of the defendant is, that the present grant is not the grant of land but of an easement only, or an exception or discharge, and that such an easement or

matter in discharge may be claimed by prescription; and that, as every prescription presupposes a grant, so a grant of such an easement or discharge to the inhabitants of a town would be good in law at this day.

If, indeed, the present claim could be considered as confined to and resting upon the ground of exemption and discharge, strictly so considered, there might perhaps be authority for contending that the inhabitants of a parish or vill might claim an exemption from toll by modern grant, and that by a private individual; for all the judges held, in the case of *Baker v. Brereman*, Cro. Car. 418, that inhabitants may prescribe for matter of discharge, as in modo decimandi, or to be quit of toll. And again, as a composition real might have been made by a private individual, that is, by the parson, with the consent of the patron and ordinary, in favour of all the inhabitants, before the restraining statutes, (see *Bree v. Chaplin*, 2 Eag. & Y. Tithe C. 270,) so also it would seem that a private individual might grant an exemption from toll to the inhabitants at large; and it affords some support to this argument that the writ *De essendo quieto* [*64 *de Theolonio* lay for persons exempt by royal grant, who could not have been impliedly incorporated by such a grant, as merchants strangers: (Fitz. N. B. 227 D.)

But the claim in this case is not simply to be exempt from toll properly so called, but from a species of payment which, although included in the word toll in the deed in question in this case, is a compensation for the use of land: and the true nature of the claim of the inhabitants under the deed is a claim to a grant of the easement of going on the plaintiff's land, and pitching their stalls there on market days, without paying any thing for the use of the soil.

And, upon referring to the several authorities which have been cited in support of the validity of such a prescription, it will be found that the claim by the inhabitants, quâ inhabitants, to any easement, wherever it has been allowed, has been invariably vested on the ground of custom, not on that of prescription. A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to look out for its origin: but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus a custom for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom, as it was held in 5 Co. 87; (a) and yet a grant of such an easement to fishermen within the district eo nomine might well be held void. [*65

The first case on which the defendant's counsel relied in argument was

(a) The reference intended is probably to Bro. Abr., *Customs*, pl. 46; as to which see *Tyson v. Smith*, 9 A. & A. 411, 412.

Gateward's Case, 6 Rep. 59 b, S. C. as *Smith v. Gatewood*, Cro. Jac. 152, reported in 6 Co. 59 b, and in Cro. Jac. 152. In that case, the claim was one by all the inhabitants of Stixwold, to have common of pasture over the place called Horsington Holmes: but this claim was set up not as a prescription but a custom; and it was held that the custom was against law. Lord COKE goes on to state that "two differences were taken and agreed by the whole court. 1. Between a charge in the soil of another and a discharge in his own soil. 2. Between an interest or profit to be taken or had in another's soil and an easement in another's soil." But it is to be observed that all the instances put are, not those of prescriptions or grants, but of customs, viz. a *custom* that every inhabitant of a town hath paid a modus decimandi; a *custom* that every inhabitant of such a town shall have a way over such land either to the church or the market, &c.; and these it is said are good, for they are of an easement and no profit. And further Lord COKE says, that "another difference was taken, and agreed, between a prescription, which always is alleged in the person, and a custom, which always ought to be alleged in the land: for every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom; *66] for that ought to be reasonable, et ex certâ causâ rationabili, *(as Littleton saith,) usitata, but need not be intended to have a lawful beginning:" a difference which points out clearly the distinction which ought to govern the present case, viz. that such an easement in the inhabitants of Easingwold as is contended for, although it might be good by custom, if it had existed from time immemorial, yet it cannot be good by prescription, which must rest upon a grant to the inhabitants. And the report of the same case in Cro. Jac.(a) will not justify the inference contended for in argument, that claims to easements by inhabitants of a town are good by prescription, merely on the ground that the reporter has used the word "prescription" instead of "custom," contrary to what is found in the report in Lord COKE, the question before the court in that case turning on a custom, not on a prescription; and the attention of the reporter not being called to the distinction now under consideration. The same observation disposes of the weight of the dictum of HEATH, J., in *Fitch v. Rawling*, 2 H. Bl. 393, in which case the question before the court arose on a claim by custom, and the attention of the court was not called to the distinction between custom and prescription. And the case of *Abbot v. Weekly*, 1 Lev. 176, is a strong authority that such claim by prescription would be bad. In trespass the defendant *prescribed* that all the *inhabitants* of such a vill had been used time out of mind to dance upon the close of the plaintiff at all times for their recreation, and so justified. And, after verdict for the defendant, one objection taken in arrest of judgment was, that the claim ought to have been laid by way of custom of the vill, not *67] by way of prescription in the persons; and a *case was cited where it had been so adjudged on demurrer. But the court held that

(a) *Smith v. Gatewood*, Cro. Jac. 152.

although perhaps it would have been bad upon demurrer, yet, issue being taken on it and found by the verdict, it is good.

No direct authority has been cited to show that such a prescription is good. And, upon consideration of those which have been brought before us, we think they negative rather than support the position, that inhabitants of a town may, by that name and description, prescribe for an easement in alieno solo. And, if they cannot prescribe for such right when enjoyed beyond the time of legal memory, still less can they claim such right under a modern grant. And upon this ground we think the exception secondly taken at the trial to the direction of the learned lord chief justice must be allowed, and that the judgment of the court below must upon that ground, therefore, be reversed, and a venire de novo awarded.

Venire de novo ordered. (a)

(a) The cause was tried a third time, before POLLOCK, C. B., at the York Summer assizes 1844; when the plaintiff again proved the charter of 1639, the deed of 1646, and the title deeds under which he himself claimed; and he called witnesses who proved payments of stallage. The defendant also called witnesses, who deposed that stalls had been placed in the market by inhabitants without payment or claim of duty, and that such claim had, in two or three instances, been made and successfully resisted; and his case was, that the exemption from stallage, though not maintainable on the deed since the decision of the Court of Exchequer Chamber, might be grounded upon usage anterior to the deed and charter, which usage was to be inferred from the facts stated by the defendant's witnesses. The lord chief baron thought there was strong evidence to show that the inhabitants had not paid toll: he told the jury that they were to consider whether the Easingwold people had any custom, usage or rights of a date more ancient than the charter, which might have given rise to the state of things appearing on the evidence, or which would account for it; and he directed them to find whether stallage was included in the exemption from toll; if they thought it was, to give their verdict for the defendant; if not, for the plaintiff. The jury found for the defendant; and the lord [68 chief baron, in his subsequent report of the case to this court, said that he thought the verdict right.

W. H. Watson, in Michaelmas term, 1844, moved for a rule to show cause why there should not be a new trial, contending that there was no evidence on which the question of immemorial usage could be left to the jury, and therefore they had been misdirected; or that, if there were any such proof, the verdict was against the weight of evidence. A rule nisi was granted. In Michaelmas term, (November 21st,) 1845,

Knowles and Martin showed cause. The evidence of the witnesses showed user of an assumed right, which, if possible, the court will refer to a legal rather than to an illegal origin. Such user cannot, consistently with the former decision in this case, be referred to the grant of 1646; but it may to a prior and immemorial usage, of which the grant itself affords evidence; and the whole question is whether there was any evidence for the jury. The charter of Charles I. merely empowered Hall to hold a market; between 1639 and 1646 he appears to have been negotiating with the inhabitants of Easingwold for land on which to hold it. The deed of 1646 shows that they then gave up some rights to him in exchange for the convenience he was about to provide for them; it is reasonable to presume that they reserved others, and that the exemption from toll, including stallage, was in effect a reservation so made. The deed shows that a market place already existed; and the probable supposition is that, by custom, though not by actual grant, a meeting for the purposes of a market was immemorially held in the town, without payment of any duties. *Tyson v. Smith*, (6 A. & E. 745: judgment affirmed in Ex. C., 9 A. & E. 406,) shows that a right of placing stalls may exist by custom in an ascertained class of persons. And, if it may have existed so here, the court will, in favour of continued enjoyment, assume that it did, on the principles laid down in 3 Stark. Ev. 904, tit. *Prescription, Grant*, &c., 3d ed. ("So forcible" to "conduct of their affairs.") The deed of 1646, if it gives no exemption, would not take away one which existed before.

W. H. Watson, Tomlinson, and Hoggins, contra, were not heard.

Lord DENMAN, C. J. We are impressed with the necessity of upholding rights that have existed from ancient times, and that can legally exist; and of presuming in their favour from the fact of user. But the question here is, whether any evidence was given of the exemption claimed. On the evidence, I think it is clear that the market was created by the charter of

1639 that was followed up by the deed of 1646; and whatever exemption was enjoyed afterwards is accounted for by that deed. *This certainly is so if the charter was the origin of the market. Is there any proof of an exemption before? No market is shown to have existed at any earlier time; there may have been buying and selling, but no legal market is proved. The charter does not even refer to such a custom as is supposed. The deed is supposed to furnish some evidence that a former market existed, because it mentions the "market place;" but this is on negotiation under a charter which had existed seven years when the deed was executed; and the deed makes no other allusion to the existence of a former market. I think, therefore, that it supplies no evidence. The jury have had a creature of imagination presented to them, on which to form a conjecture. Had there been any evidence of the asserted right we should have supported it: but I think there was none; and therefore the rule must be absolute. (*W. H. Watson* referred to the recital in the charter, that an *ad quod damnum* had been previously executed.)

WILLIAMS, J. The mention of a market place in the deed does not raise the inference of a market having existed before 1639. If the charter then granted was the origin of the market, the place may have acquired that name by 1646, though no market existed there before the charter. It is argued that, where user may be referred to an origin which will sustain it in point of law, and one that will not, the legal one should be preferred. But here no evidence of the alleged legal origin appears.

COLERIDGE, J., was absent on account of indisposition.

WIGHTMAN, J. The deed will account for all the exemption enjoyed since 1646; but, if there were any evidence of a previously existing market, that evidence might certainly raise a question whether the exemption did not result from a previous custom. Here no evidence on the subject appears, except from the deed itself: but that rather negatives the supposition when it speaks of "the great charge that the said George Hall hath been at in procuring the said market, and the great benefit it is like to bring to the inhabitants and their heirs in the said town of Easingwold in time to come." The inference from the deed is, that the ground for a market house was given up in consideration of the exemption. The market may have been held somewhere for the preceding seven years: and the place where it was held may have gained the name of the market place. I therefore think there was no evidence for the jury.

Rule absolute.

*70] *The QUEEN v. The HULL and SELBY Railway Company. *May 27.*

Stat. 6 & 7 W. 4, c. 80, incorporating The Hull and Selby Railway Company, and empowering them to build a bridge over the Ouse, recited that the building of such bridge might diminish the tolls received at a neighbouring bridge over the same river, belonging to another company. It therefore enacted that, if, in the first three years after the opening of the railway, there should be an annual decrease in the tolls of the last mentioned bridge, as compared with the tolls during the three preceding years, the railway company should forthwith pay the bridge company a sum equal to ten years' purchase of such annual decrease, taken upon an average of the three years in which it occurred. The decrease took place; and the compensation was claimed.

Held, that debt lay against the company for the amount; and that a mandamus to pay was not a more effectual remedy, and ought not to be granted.

W. H. WATSON, in last Easter term, obtained a rule calling on the above named company to show cause why a mandamus should not issue, commanding them "forthwith to pay to the Company of Proprietors of Selby bridge the sum of 2500*l.*," pursuant to stat. 6 & 7 W. 4, c. 80, (local and personal, public.)

The affidavits in support of the rule stated that, by stat. 31 G. 3, c. 60, certain persons were incorporated by the name of "The Company of Proprietors of Selby Bridge," and empowered to build and maintain a bridge over the river Ouse, near the ferry of Selby, in Yorkshire, and were likewise empowered by that act and stat. 43 G. 3, c. 48, (local and personal,

public,) to take certain tolls for pontage before any passage over the said bridge should be permitted; and that they had built the bridge, and levied, and were still receiving, the tolls.

That, by stat. 6 & 7 W. 4, c. lxxx., "for making a railway from Kingston-upon-Hull, to Selby," certain persons were incorporated for that purpose by the name of "The Hull and Selby Railway Company," and were empowered to construct a railway and other works, including a bridge over the Ouse, partly in the township of Selby, and to take tolls for the use of such railway *and works. That, by sect. 154, it was enacted, (after referring to the statutes of 31 and 43 G. 3,) as follows.(a) [*71

"And whereas the construction of a railway bridge across the river Ouse for the passage of carriages over the same near to the said Selby bridge may effect a considerable reduction in the amount of tolls received by the said company of proprietors of Selby bridge, whereby the said company might be disabled from effectually supporting and maintaining in repair the said bridge," &c.; "be it therefore enacted, that if during the first three years, to be computed from the expiration of one calendar month, immediately after the whole line of the said railway shall be completed and opened for public use, there shall be an annual decrease in the receipts for tolls taken by the said company of proprietors of Selby bridge at the said Selby bridge as compared with the receipts during the three immediately preceding years, then and in such case the said railway company shall forthwith pay to the said company of proprietors of Selby bridge a sum of money equal to ten years' purchase of such annual decrease, taken upon an average of three years during which the same shall occur, so as such sum of money shall not exceed the sum of 2500*l*." (A similar provision was then made as to the next three years.) "Which sums or such of them as shall become payable shall be accepted in full satisfaction and discharge of all claims and demands whatsoever upon the said railway company by the said company of proprietors of Selby bridge in respect of the said tolls, and as a full indemnification to the said railway company *and all persons acting under their authority from and against all penalties and forfeitures [*72 whatsoever by the said recited acts or either of them imposed for carrying any person," &c., "across the said river Ouse within the said townships of Selby," &c., "otherwise than over the said bridge."(b)

It was then stated that the whole line of the Hull and Selby railway was opened for public use on 1st July, 1840; and that, in three years next following, an average annual decrease of 338*l*. 2*s*. 5*d*. had taken place in the tolls of Selby bridge, and therefore the bridge proprietors were entitled to receive from the railway company 2500*l*.; which sum had been demanded but not paid. The affidavits gave further details, explaining and confirming the statement of account. In last Easter term,(c)

(a) The whole section was set out in the affidavit. The material parts only are retained here.

(b) A few other sections were referred to in the course of the argument; but a particular statement of them is unnecessary.

(c) May 6th. Before Pattenon, Williams, and Wightman, Jn.

Erle and *Taprell* showed cause. A mandamus is at any rate unnecessary; if the claim is well founded, debt will lie. *Corrigal v. The London and Blackwall Railway Company*, 5 Man. & G. 219, is an instance of such an action brought against a company for compensation under a railway act. [PATTESON, J. In *Regina v. The Great Western Railway Company*(a) we ordered a mandamus to the company to make compensation to the proprietors of Maidenhead bridge.] No question was raised there as to the form of proceeding. Many authorities show that money due in respect of a remedy given, as here, by the words of a statute, may be recovered *73] in an action of debt; Com. Dig. *Action upon Statute*, (A 2;) *Anonymous Case* in 6 Modern Rep. 27, there cited; *Tilson v. The Warwick Gas Light Company*, 4 B. & C. 962; *Carden v. General Cemetery Company*, 5 New Ca. 253; *Hopkins v. Mayor, &c. of Swansea*, 4 M. & W. 621; and *Mayor, &c. of Swansea v. Hopkins*, 8 M. & W. 901: and (as to the question, generally, whether mandamus or a civil action should be the remedy,) *Cane v. Chapman*, 5 A. & E. 647, is an authority for proceeding by action. PATTESON, J., said, in *Rex v. The Nottingham Old Waterworks Company*, 6 A. & E. 355, 369, as to the sum there assessed for compensation by a jury under a local act, "if there be a specific remedy for this sum, we cannot grant the mandamus:" the same principle is recognised in the judgment of this court delivered by Lord DENMAN, C. J., in *Regina v. The Victoria Park Company*, 1 Q. B. 288, 291; and there, in answer to the argument that a mandamus has issued where there was a legal remedy "in cases where that remedy was not so complete and beneficial as the writ would enforce," the court said: "But that has been where the remedy at law was not in its nature so complete, without reference to any circumstances peculiar to the case in which it was to be used, as in *Rex v. The Severn and Wye Railway Company*," 2 B. & Ald. 646. [WIGHTMAN, J. Suppose judgment were recovered against the company in an action of debt, what could be taken in execution?] Their engines. An *elegit* might issue.

W. H. Watson and *Hugh Hill*, contra. The local act orders that the company "shall forthwith pay" to the proprietors a sum equal to ten *74] years purchase, &c. Supposing that, under sect. 154, an action of debt would lie, which is not clear, still there ought to be an effectual mode of obliging the company "forthwith" to pay; and a levy on the engines, or an *elegit*, would not be such a mode. The act (sect. 199) enables the company to mortgage "the property of the said undertaking;" and it might be under mortgage when the execution issued. [WIGHTMAN, J. We are not told that it is under mortgage. PATTESON, J. The company are a corporation. What advantage would you gain by the issuing of a mandamus to them?] An attachment might be had in case of disobedience. Where a party is required specifically to do a certain thing, mandamus is

(a) Rule absolute for a mandamus, Trinity term, (June 17th,) 1843; when the court said that the question between the parties was to be raised by the return. The case is reported in a subsequent stage, on a point of practice only, 5 Q. B. 597.

the proper remedy. [WIGHTMAN, J. That is where, unless a mandamus went, the thing would not be done. But, here, in an action of debt the money would be recovered.] *Regina v. The Great Western Railway Company*(a) affords a direct precedent for a mandamus; and there it might as reasonably have been urged as in this case that debt was the remedy. If it be contended that the issuing of a mandamus would not certainly be followed by performance of the thing required, the answer is that given to a similar argument by the court in *Regina v. The Eastern Counties Railway Company*, 10 A. & E. 531, 566. "The indictment does not compel the performance, but only punishes the neglect of duty: though it was thought proper to remind us that mandamus might do no more, for that disobedience would only bring the party into contempt, and expose them to attachment, which would but end in individual suffering, *and leave the required act still undone. Yet we are not in the habit of supposing that persons required to obey the queen's writs issuing from this court will incur the penalty of contempt for contumacy, or be advised to evade the known and ancient process of the law." As to the cases cited to show that debt is the remedy; *Tilson v. The Warwick Gas Light Company*, 4 B. & C. 962, was the case of private individuals suing for expenses incurred by them in soliciting and obtaining the company's act: mandamus would not have lain. *Carden v. The General Cemetery Company*, 5 New Ca. 253, was also the case of a private claim for services; much of the argument turned on the legal obligation to pay; and, though it was contended that debt would not lie, the remedy suggested as preferable was by action on the case. Where the proceeding is founded upon a by-law, (as in *Hopkins v. Mayor, &c. of Swansea*), 4 M. & W. 621,(b) debt lies for that reason. In *Cane v. Chapman*, 5 A. & E. 647, the ground of action was nonpayment to an individual of moneys due to him, and which the commissioners (sued by their clerk) had in their hands: there mandamus was clearly not the remedy. ABBOTT, C. J., and BEST, J., assigned as reasons for granting a mandamus in *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646, that indictment would not have been "a remedy equally convenient, beneficial, and effectual," and that if by imposition of a fine the proposed object could have been attained, yet considerable delay might ensue. That argument bears directly on the present case. The objection from delay is important, where the decrease of tolls and nonpayment of *compensation may cause a bridge to go out of repair. [PATTESON, J. There are clauses in stat. 6 & 7 W. 4, c. lxxx., giving a remedy by distress and sale of the company's goods;(c) and an action of debt is given.](d) That shows that if such a remedy had been contemplated in the present instance it

(a) See p. 72, note (a), *antè*.

(b) S. C. in Error, (*Mayor, &c. of Swansea v. Hopkins*), 8 M. & W. 901.

(c) Sects. 31, 37, 74, 175.

(d) For recovering indemnity if the railway company shall occasion damage or injury to Selby bridge in the construction of their works, and the bridge company shall (under the circumstances there mentioned) repair such damage or injury themselves. Sect. 156.

would have been expressly provided. [PATTESON, J. The argument is not worth a farthing; it is the ordinary inaccuracy of acts of parliament.] In *Rex v. The Nottingham Old Waterworks Company*, 6 A. & E. 363, 364, 3 Blackstone's Commentaries, 159, 160, was cited as showing that "what-ever" "the laws order any one to pay, that becomes instantly a debt," and an action may be brought to recover it: but the application of the doctrine to that case was not admitted by the court; and COLERIDGE, J., said: "As to the remedy by action of debt, can any one say that it clearly exists? The authority of 3 Blackstone's Com. 159, 160, was cited, but no decision; and the doctrine would certainly be now much disputed." In *Rex v. The St. Catharine Dock Company*, 4 B. & Ad. 360,(a) the court granted a mandamus *to enforce payment of a sum of money by the company, there *77] being no other effectual remedy.(b) Any question as to the principle on which the accounts have been taken may be raised and tried on the return to a mandamus. If there be no such question, the writ will at once be obeyed. Cur. adv. vult.

PATTESON, J., now delivered the judgment of the court.

We are of opinion that an action of debt lies, and is not a less effectual remedy than a mandamus. In each case a jury may assess the amount to be recovered. A peremptory mandamus could be enforced only by distress of the goods, to which recourse would be had here in an action of debt. *Regina v. The Great Western Railway Company* (c) does not apply: the defendants there submitted without raising the present question. The rule must be discharged, but without costs, as the applicants may have been misled by the granting of a mandamus in that case. Rule discharged.

(a) Patteson, J., observed that the report of this case was probably incorrect in stating that the company was incorporated; and, on reference to the company's act, 6 G. 4, c. cv., (local and personal, public,) sect. 1, it appears that they were by that act only "united into a company of proprietors of the docks," &c., "which said company shall be a joint stock company," &c. And the original mandamus, which has been referred to, recites that the persons named in the act, "and their several successors, executors, administrators, and assigns, were thereby united into a company of proprietors," &c., not "incorporated," as stated in 4 B. & Ad. 360. The clauses as to actions against the company, and execution in such actions, are partly set out in *Corpe v. Glyn*, 3 B. & Ad. 801, 802, notes (a)(b).

(b) Taprell referred to the comment made by the court on this case in *Regina v. The Victoria Park Company*, 1 Q. B. 290.

(c) See p. 72, note (a), anté.

The QUEEN v. The Governors and Directors of the Poor of ST. ANDREW, HOLBORN, above BARS, and ST. GEORGE THE MARTYR, who were in Office on January 23d, 1838, and MARCHANT and Others, their Collectors. [78

The Poor Law commissioners caused an auditor to be appointed under stat. 4 & 5 W. 4, c. 76, s. 46, to audit the accounts of a union and the several parishes therein, to examine whether the expenditure was lawful, to strike out payments and charges not authorized by some provision of the law, or order of the commissioners, and to see that the accounts were properly stated, with vouchers. A district within the union had already auditors under a local act, (6 G. 4, c. clxxv.) which provided for the maintenance of the poor and regulation of the nightly watch. Their duty under the act was, to audit the accounts of the directors of the poor, which the directors were required to produce, with vouchers: no power of disallowing items was given to the auditors; but it was enacted that, if they disapproved of any part of the accounts, it should be lawful for them to appeal to the quarter sessions, entering into recognisance to pay costs if awarded against them: and the sessions were empowered to award costs to the appellant or the party appealed against.

Held, that the directors, though they had accounted to their own auditors according to the local act, were not thereby exempted from accounting to the union auditor under stat. 4 & 5 W. 4, c. 76, s. 47.

The officers accounting for the receipt and expenditure of the poor rate to an auditor appointed by direction of the Poor Law commissioners must account for all sums collected under the denomination of poor rate, and expended for any purposes, (as watching, police, &c.) to which, by local or general acts, the poor rate is applicable; not for those sums only which are raised and laid out strictly for the relief and management of the poor.

MANDAMUS. After reciting the appointment of the above named directors under a local act, (6 G. 4, c. clxxv., local and personal, public,) and that they had ascertained, charged and collected divers large sums of money for poor rates, and managed the expenditure of the same, &c., and had appointed the other defendants to be collectors; that, by an order of the Poor Law commissioners, the part of the parish of St. Andrew, Holborn, which lies above Bars, and the parish of St. George the Martyr, had, with other places been formed into a union, called the Holborn Union; (a) and that the commissioners, *by another order, (7th July, 1836,) had appointed [79 and declared that the said union, with divers other parishes and unions, should be united and should be a union for the purpose of appointing an auditor as therein mentioned; and also reciting that James Hales Mitchiner had been duly appointed such auditor under the last mentioned order, for the examining and auditing, allowing or disallowing, of accounts in the several parishes and unions therein mentioned, including the said Holborn Union, and that the defendants had refused, when required, to produce to the said J. H. M. "a full and distinct account of all moneys, matters and things committed to the defendants' charge, or received, held or expended by them on the behalf of the said parishes, so far as related to the moneys assessed for the relief of the poor:" the writ commanded the defendants forthwith to make and render to the said J. H. M., the auditor

(a) See *Regina v. The Poor Law Commissioners, in the matter of the Holborn Union*, 1 A. & E. 56.

appointed, &c., a full and distinct account of all moneys, &c., committed, &c., or received, &c., on behalf, &c., so far, &c. (as above.)

Return. After stating that the rates assessed, charged and caused to be collected by the said governors and directors who were in office on the said 23d January, 1838, commonly called the poor rates, were by law and by the provisions of the said local act applicable to other purposes besides the relief of the poor and wholly unconnected therewith, and after denying that the said governors and directors managed and regulated the expenditure of any part of the moneys, so ascertained, charged and collected, which were assessed for, and were applicable to, the relief of the poor, and alleging that the expenditure of the whole of the moneys assessed for, and applicable

*80] to, such purposes was managed and *regulated, without any control or interference on their part, by the board of guardians for the time being of the union formed as in the said writ first mentioned, to which board, or to their order, they the said governors and directors duly paid over from time to time all moneys assessed and collected for the relief of the poor as and when they were required; the defendants further stated that they the said governors, &c., who were in office on, &c., before they were required to render any account to the said J. H. Mitchiner, had, in pursuance of the said local act and the provisions of the Poor Law Amendment Act in that behalf, duly accounted for all moneys which came into their hands whilst in office to the auditors appointed under the said local act, and that such accounts had been duly audited, passed and approved pursuant to the statutes in that behalf; and that the defendants the collectors had duly accounted to the said governors and directors for all moneys received by them, and paid over the balances in pursuance of the said local act: And the defendants, who were governors, &c., on, &c., further returned that, after the issuing of the mandamus, and in pursuance thereof, viz. on 23d July, 1839, they did make and render to the said J. H. M. a full and distinct account of all moneys, matters and things committed to their charge, or received, held or expended by them on behalf of the said parishes, so far as relates to the moneys assessed for the relief of the poor: and the said collectors returned that, long before the teste and issuing of the writ, they had duly accounted as required by the local act, and had duly delivered up their books, accounts and vouchers to the governors and directors, and that they could not render the account required by the mandamus.

*81] *The said J. H. Mitchiner, by his traverse to the return, denied that the said governors and directors who were in office, &c., did pay over from time to time to the said board of guardians for the time being of the union formed, &c., or to their order, all moneys assessed and collected for the relief of the poor as and when they the said governors and directors were required so to do, in manner and form, &c.: whereupon issue was joined. Mitchiner also by his said traverse denied that the said governors, &c., did, after the issuing of the mandamus, and in pursuance of the requisition thereof, make and render to the said J. H. M. a full and

distinct account of all moneys, &c., so far, &c., in manner and form, &c. : whereupon issue was joined.

The same cause came on to be tried before COLERIDGE, J., at the sittings for Middlesex after Michaelmas term, 1840, when the jury were by consent discharged from giving a verdict on the first issue, and a verdict was found for J. H. Mitchiner, the prosecutor, on the second issue, for 1s. damages and 40s. costs, subject to the opinion of this court upon a case, which was accordingly stated, and the material parts of which were as follows.

After the passing of stat. 4 & 5 W. 4, c. 76, the Poor Law commissioners, by an order duly signed, sealed and notified, dated 26th March, 1836, in pursuance of the powers of that act, ordered that the parishes and places following, viz., St. Andrew, Holborn, above Bars, united with St. George the Martyr, (being the district described in the writ as "that part of the parish of St. Andrew," &c., "and the parish of St. George, &c.,) together with the liberty of Saffron Hill, Hatton Garden, Ely Rents and Ely Place, all in the county of Middlesex, should on the *27th day of April then next be, and thenceforth should remain, united for the adminis- [*82 tration of the laws for the relief of the poor, by the name of The Holborn Union, and that a board of guardians should be appointed and chosen for such union, as therein mentioned.

The commissioners, by a further order, dated 20th April, 1836, ordered that the guardians of The Holborn Union should, subject to the approbation of the commissioners, appoint a sufficient number of persons to perform the duties hereinafter specified to belong to each of the offices hereinafter mentioned, including amongst others the office of auditor, and thereby ordered that the duties of the auditor to be so appointed by the guardians should be: "1. To audit the accounts of the said union and of the several parishes comprised therein at proper periods. 2. To examine whether the expenditure in all cases was such as might lawfully be made, and to strike out such payments and charges as were not authorized by some provision of the law, or by virtue of the orders, rules and regulations of the Poor Law commissioners. 3. To see that the accounts were presented in the proper form, and that the particular items of receipt and expenditure were stated in detail, and supported by adequate vouchers of receipt and authority for payments, and that all sums received, or which ought to have been received, were brought into account."

The commissioners, by a further order, dated 7th July, 1836, and addressed to the guardians and ex officio guardians of the parishes of St. Pancras and St. Martin in the Fields, and of the several unions known by the names of Strand Union, The Holborn Union, The Brentford Union, The Staines Union, and the Uxbridge Union, *all in the county of Middle- sex, and to the churchwardens and overseers, treasurers, auditors and [*83 other officers of the said parishes and unions, and of the several parishes forming part of such unions respectively, and to the clerk or clerks to the

justices of petty sessions held for the division or divisions in which each parish is respectively situate, declared that the several parishes therein mentioned, and the several parishes comprised within the unions therein mentioned, including The Holborn Union, should be united, and thenceforth be and be deemed a union for the purpose of appointing an auditor in the manner thereafter provided: and that the guardians of such parishes and unions should, at the time and in the manner therein mentioned, appoint an auditor for the examining and auditing, allowing or disallowing, of accounts in the respective parishes and unions, and in each of the several parishes comprised in such unions respectively.

The commissioners, by the same order, fixed a salary for the auditor, payable by the parishes, &c. in certain proportions; the auditor to hold his office till May 1st then next unless otherwise ordered by the commissioners, &c., and to be, &c., and be deemed, as to such united parishes and unions and each of them, an auditor appointed by virtue of the Poor Law Amendment Act, and of the commissioners' orders under the same, and, during his said office, to be vested with, and empowered to exercise, all the powers and authorities, as to calling for and verifying by the oath or declaration of the parties required to verify the truth thereof the accounts of such parishes and unions respectively and the statements of such parties, as were in and by such act given and provided for auditors in that respect. A
 *84] *further order was made, 29th April, 1837, as to the duration of the auditor's office.

The relief, government and management of the poor in the district described in the said orders as the united parishes of Holborn above Bars and St. George the Martyr in the county of Middlesex was, at the times of the passing of stat. 4 & 5 W. 4, c. 76, and the making of the first order by the commissioners, vested in a board of governors and directors constituted and appointed under an act, (6 G. 4, c. clxxv., local and personal, public,) "for the better ascertaining, charging and collecting of the rates for the relief of the poor within that part of the parish of St. Andrew," &c., "and the parish of St. George," &c.; "for the better maintenance, employment, and regulation of the poor thereof; and for regulating the nightly watch thereof."

Sect. 5 (a) directs that the rate-payers shall yearly elect fifty persons, who, together with certain ex officio guardians, shall be governors and directors of the poor, and shall and may from time to time make orders for the government, relief and maintenance of the poor, ascertaining, charging, collecting, managing and regulating of the poor rates, appointment, &c. of watchmen and beadles, and regulation of constables. Sect. 12 directs them to meet twice every year to calculate and settle the sums to be assessed as well for the relief, &c. of the poor, and for regulating and maintaining a nightly watch and beadles, as for discharging any debts previously incurred

(a) The clauses were set out more fully in the case.

or remaining unsatisfied by reason of the deficiency of any former rates. Sect. 13 enacts that, after the said sums shall have been ascertained, the inhabitants and occupiers of premises within that part of the *parish of St. Andrew, &c., and the parish of St. George, &c., shall, at a [*85 meeting of which notice is to be given, make two distinct rates or assessments, to be raised by an equal pound rate, &c., their gross amount not to exceed the gross amount settled and ascertained, &c., one for the relief, &c. of the poor, the other for defraying the expenses of the watch and beadles, which rates shall be respectively entered in one or more book or books, and shall be collected, one moiety immediately, and the other after the expiration of three calendar months. Sect. 24 gives certain powers to the collectors; and sect. 28 authorizes the governors and directors to appoint and remove them, &c.

By sect. 29, it is enacted that every clerk, treasurer and collector appointed by the said governors and directors "shall at all times, when thereunto required by the said governors and directors, render a full and perfect account of all moneys by them respectively received and paid by virtue of their said offices," and pay over the balance in their hands, if any, as the governors and directors shall appoint.

By sect. 30, it is enacted that the inhabitants and occupiers of the said parishes shall yearly elect, in manner therein mentioned, five fit persons to be auditors of the accounts of the governors and directors, qualified as in the said clause is mentioned: and that such auditors, or any three or more, shall meet twice a year to audit the accounts of the said governors and directors to the period of such meeting, in the presence of their clerk, as in the said local act mentioned: and the said governors and directors are thereby required to produce and lay before the said auditors at every such meeting a just and true account in writing, accompanied *with proper vouchers, of all sums of money which have come to the hands [*86 of the said governors and directors or their treasurer by virtue of the said local act, and of all moneys paid, laid out or expended by them during the said period, and in and about the carrying the said act into execution, and other expenses incident thereto; and that, in case the said auditors shall think that there is just cause to disapprove of any part of the said accounts so to be presented, it shall be lawful for them to appeal against the same in manner as in the said local act mentioned. And it is by the same section provided that no appeal against such accounts shall be made or proceeded in by any person or persons, except the same shall be directed by the said auditors or the major part of them, during such time as they shall be engaged in such accounts; and that all such accounts so audited shall be left at the board room, for the examination of the said auditors only, for three successive days, and afterwards for the inspection and information of the inhabitants of the said parishes for seven successive days.

By sect. 55 and the following sections, power is given to the governors and directors to borrow money for the purposes of the act on the credit of

the rate, and to grant annuities and give securities in manner there mentioned.(a)

*87] "After stat. 10 G. 4, c. 44, "for improving the police in and near the metropolis" came into operation, no rates were made for defraying the expenses of the watch and beadles under the local act, the functions of such watch and beadles having been superseded by the police force appointed under the said act, and the expenses of such police force having been made payable out of the poor rate under the 23d, 24th, and 25th sections of the general act, (10 G. 4, c. 44:) and, accordingly, no separate watch rate was afterwards made by the said governors and directors; but only one rate was from thenceforth made under the name of the poor rate, out of which the said governors and directors paid as well the sums required for the relief, &c. of the poor, as the contribution required for the police, the contribution required for county rates, the interest upon moneys theretofore borrowed, and annuities granted by the said governors and directors under the said local act, and all other expenses incident to the carrying the said local act into execution: and this was the course pursued by the defendants as governors and directors whilst they were in office.

The case then stated the appointment of the first mentioned defendants, on Friday next after 25th March, 1837, to be governors and directors for the ensuing year, and the making of a rate by them, dated 25th August, 1837, entitled "a rate," &c. "of 1s. 2d. in the pound, for the relief, maintenance, lodging and employment of the poor of that part of the parish of St. Andrew," &c., "and the parish of St. George," &c., "upon every person," &c.

Before, and for the purpose of, making the said rate, the governors and directors met in pursuance of sect. 12 *of the local act, to calculate and settle the amounts required for the different purposes to which the rate was, by law, applicable: viz. the relief of the poor, the county rate, &c. (see below,) and other expenses hereinafter mentioned. At this time, the governors and directors were engaged in law proceedings for the purpose of contesting the validity of the Poor Law commissioners' orders above mentioned for and relating to the union of the above mentioned district with other places: and, amongst other items of estimated expenditure from the proceeds of the intended rate, the sum of 700*l.* was calculated by the governors and directors to be required for law expenses in relation thereto. At the said meeting, 3679*l.* was calculated as the sum which would be required for the relief of the poor. The amounts so settled and ascertained

(a) Sect. 69 (not set out in the case) gives to any person who shall think himself aggrieved by any rate or assessment made, or penalty imposed, or by any conviction or other matter or thing done in pursuance of this act, an appeal to the first general or quarter sessions for the county of Middlesex which shall be held after the expiration of one month after the time of making such rate or of imposing such penalty or conviction, the appellant entering into a recognisance to try, and to pay such costs as shall be awarded at the sessions; and the justices in sessions are empowered to hear and determine, and to award costs to the party appealing or appealed against.

were submitted to a meeting of the inhabitants pursuant to sect. 13 of the local act; and they made the assessment before mentioned for raising the sums required for the purposes aforesaid.

The amount of the rate, supposing the whole collected, was 6799*l.* 4*s.* 6*d.* The total amount produced by the rate was 6246*l.* 13*s.* 3*d.*; of which sum the governors and directors appropriated, for the purpose of being paid over to the guardians of the said Holborn Union for the relief of the poor in the district of the said governors and directors, the said sum of 3679*l.* so calculated, &c. as aforesaid; and the residue they appropriated and applied to the other purposes before mentioned: viz. to the police rate, the county rate, the payment of part of the principal and interest and annuities in respect of the debts charged upon the rates made under the said local act, and salaries to officers, and other expenses attending the carrying of the said local act into execution, *and law charges, such as appeals against rates and the like, but chiefly in reference to the said litigation with the Poor [*89 Law commissioners. Various sums had been required of the governors and directors by the guardians of the Holborn Union for the relief of the poor, and expenses of the workhouse: these sums were not paid when demanded, by reason of the said litigation, but were paid on its conclusion, and before the mandamus issued.

After the issuing of the mandamus, and before the return, viz. July 23d, 1839, the said J. H. Mitchiner, who had been, on July 28th, 1836, chosen and appointed auditor for the parishes and unions mentioned in the order of July 7th, 1836, including The Holborn Union, except St. Pancras, and who continued to hold and execute such office, attended at the workhouse of the said part of the parish of St. Andrew, &c., and St. George the Martyr, for the purpose of auditing the accounts thereof, due notice having been given to the said governors and directors and their said collectors; "and they were duly required to produce to the said J. H. M. a full and distinct account of all moneys, matters and things committed to their charge, or received, held or expended by them, on behalf of the said parishes, so far as related to the moneys assessed for the relief of the poor." Charles Boydell, as clerk to, and on behalf of, the governors and directors, attended and delivered an account, which was set forth in the case; but the following summary, also given in the case, describes it sufficiently for the purpose of this report.

"The credit side of the above account contains a correct statement of the sums paid by the governors and directors at the times therein mentioned to the guardians *for the relief of the poor, but contains no account of the other applications of the money raised as above mentioned [*90 under the name of poor rate, although considerable sums had, during the period embraced by the account, been expended by the governors and directors for the various other purposes above mentioned, including the law charges before referred to. The sums mentioned on the debit side of the account as assessed for the relief of the poor formed the whole amount of

the various sums calculated, ascertained and settled by the governors and directors as necessary according to their judgment to be assessed and charged for the relief of the poor as aforesaid under the 12th section of the local act; but they formed only part of the sums calculated," &c., "by the said governors and directors to be assessed and charged, and which were accordingly assessed and raised by the said inhabitants, under the said local act, under the name of poor rate, for the various purposes hereinbefore mentioned," including the law charges.

Mitchiner then demanded an account of the entire sums that had been collected under the name of poor rate, and how they had been expended, and required to see the whole poor rate, and the various books relating to it: but the governors and directors refused to give any farther account.

The questions for the opinion of this court were: 1. "Whether or not the said governors and directors, having, as is admitted by the pleadings, fully accounted to the said auditors under the said local act of parliament, are also bound to account to the auditor appointed under the order of the said Poor Law commissioners under the 46th and 47th sects. of stat. 4 & 5 W. 4, c. 76."

*2. If they are bound so to account, "whether or not the account *91] rendered by the said C. Boydell on the part of the said governors and directors as above mentioned is a sufficient account within the meaning of the said sections, so as to entitle the defendants to have the verdict entered for them on the second of the above issues."

The mandamus, return and pleadings, the local act, and the before mentioned orders of the commissioners, were to be considered as part of the case.

The case was argued last term.(a)

Tomlinson for the crown. First, the account rendered to the auditors under the local act furnishes no answer to this writ. Stat. 4 & 5 W. 4, c. 76, s. 47, requires the officers there named to account to their own superiors, a final account being, however, demandable by the auditor who shall have been appointed, under sect. 46, by the Poor Law commissioners. If the governors and directors, now defendants, are exempt from such audit, it must be by some special provision. The exemption might with some reason be claimed if the local act created an auditor having all the powers which are to be exercised in discharge of that office under the order of the commissioners: but the officers appointed under stat. 6 G. 4, c. clxxv., are not such auditors. The auditor now claiming the account is an officer appointed under authority given to the commissioners by stat. 4 & 5 W. 4, c. 76, sects. 15, 21, and 46, for the purpose of fully carrying out the intentions of the statute; one of which is, that where an audit takes place

*92] it shall be an efficient one, with a power at *once to disallow improper items. This appears from sects. 47 and 89. The auditors under the local act are not persons appointed, according to sect. 47, "by virtue

(a) April 27th, 1844. Before Lord Denman, C. J., Patteson, Williams, and Wightman, *Ja*

of any statute" "to examine, audit, allow, or disallow" accounts: under sect. 30 of the local act, if they disapprove of the items, they can only appeal to the sessions; and that, by sect. 69, at the risk of costs. It is true that there may be a disallowance at the quarterly audit before justices in petty sessions: but the object of the commissioners' order was, agreeably to the intention of stat. 4 & 5 W. 4, c. 76, (which, for this among other purposes, enables them, by sect. 42, to make such orders,) that there should be early settlements of account, and payment of balance. The point now before the court has never been expressly decided: the judgment lately given in *Regina v. Earl of Dartmouth*, 5 Q. B. p. 878, does not bear upon it: but *Regina v. The Poor Law Commissioners, (Allstonefield Incorporation,)* 11 A. & E. 558, though not directly applicable, is, in principle, a strong authority for the prosecutors in this case. The decision on this point, if in favour of the defendants, would entitle them to an arrest of judgment. On the second point the question is, how the verdict should be entered. The account rendered to Mitchiner was not a compliance with the writ, which required that the defendants should render to him "a full and distinct account of all moneys, matters and things committed to their charge, or received, held or expended by them on the behalf of the said parishes, so far as relates to the moneys assessed for the relief of the poor." The directors, because they have mentally appropriated a part of the rate to the actual relief of the poor, consider *themselves entitled to withhold an account of all except that part. But the other items [93 comprise moneys "received, held or expended" by the directors, forming part of the sum "assessed" for the relief of the poor. That sum is the total amount of the rate laid nominally for that purpose. And the items, by their nature and magnitude, require a more efficient control than that of the auditors under the local act.

Erle, contra. First, as to the point argued secondly on the other side: the defendants have obeyed the mandamus; and, if so, the other point argued does not arise. The directors have accounted to Mitchiner for the sums raised for the relief of the poor; and this and the other purposes of the rate are kept wholly distinct by stat. 6 G. 4, c. clxxv. The assessment for these latter purposes is a poor rate only in name. The real object of the present litigation is to disaffirm the appropriation of the rate to law costs: but on this point the local auditors are more likely to be competent judges than Mitchiner; and his decision could not, like that of the local auditors, be reviewed on appeal. The general control given to the Poor Law commissioners by stat. 4 & 5 W. 4, c. 76, s. 15, relates strictly to "the administration of relief to the poor:" no other object is mentioned. Secondly; the reasons assigned for vesting the power of audit in the Poor Law commissioner to the exclusion of the local ones are insufficient. It is argued that the decision of the poor law auditor is preferable, because final, and therefore efficient: but his allowance or disallowance is subject to review at the petty sessions; *Regina v. Fouch*, 2 Q. B. 308; *Regina v.*

*94] *Earl of Dartmouth*, 5 Q. B. p. 878, stat. 4 & 5 W. 4, c. 76, s. 89. The investigation before local auditors, elected by and representing the parishioners, is a regular and convenient course, and subject to a proper control by appeal to the quarter sessions: it is said that the appeal renders such a proceeding cumbrous, and less effectual than the examination by a poor law auditor; but that argument assumes that his judgment will always be satisfactory. [PATTESON, J. Does the local act give costs to the parish auditors on appeal?] They may have them, under sect. 69. In sect. 47 of stat. 4 & 5 W. 4, c. 76, which expressly provides for the taking of an account, the object principally in view is that there shall be an account every quarter of a year; and it is contemplated that, for the purpose of such account, there shall be, in every parish or union, some auditor; but the clause does not profess to make new regulations for the appointment of them. The argument for the crown requires that the word "auditors" should be taken to mean auditors armed with certain exclusive authorities; a construction not warranted by the words, and opposed by the cases just cited. The power of control given by sects. 15 and 21 may be fully exercised without superseding the local auditors. The words of sect. 46 are certainly very large, and enable the commissioners to appoint officers for the purpose, among others, of auditing accounts, and to define their duties: but this clause must be taken in conjunction with sect. 47; and, if the requisitions of the latter clause may have been fully complied with by the audit which has here taken place, the enactment of sect. 46 cannot of itself render that compliance insufficient. Under sect. 47 the return is an answer to the writ.

*Tomlinson in reply. The local act does not differ in its effect *95] from other statutes which authorize the making of assessments for various purposes under the general name of a poor rate. The argument for the defendants would limit the power of auditors under the Poor Law Amendment Act in the case of every such rate. But, if an auditor of this description may look into the accounts of the poor rate strictly so called, he must, in order to ascertain the balance under this head, inquire also into the balances of the other sums levied under the general denomination of poor rate, and inspect the vouchers. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (June 8th,) delivered the judgment of the court.

There were two questions in this case proposed for our consideration: 1. Whether the defendants, having accounted to the auditors under the local act, 6 G. 4, c. clxxv., were also bound to account to the auditor appointed under the order of the Poor Law commissioners: and 2 Whether, if they were bound to account to such auditor, the account rendered by them as stated in the case is sufficient.

With respect to the first of these questions, the powers of the auditors under the local act are so inadequate to the performance of the duties required of the auditor appointed under the order of the Poor Law com

missioners, having no power to disallow any of the items in the accounts, that we are clearly of opinion that the defendants were bound to account to the latter auditor, though they had already accounted to the *auditors under the local act. This part of the case was indeed scarcely [*96 contested on the part of the defendants, and was in effect settled by the decision of this court in the case of the *Allstonefield Union*.(a)

With respect to the second question, it was contended on the part of the defendants that they were not bound to render an account to the auditor appointed under the order of the Poor Law commissioners of all the money collected by them under the rate denominated "the poor rate," which was partly applicable to other purposes than the relief of the poor; but only of so much of the produce of the rate as was raised for and applied to the purpose of the relief of the poor. The defendants made a rate of 1s. 2d. in the pound for the relief, maintenance, lodging, and employment of the poor, which by estimation would produce a sum of upwards of 6000*l.*; but of this not much more than half was applied, or intended to be applied, to the relief of the poor; the residue was applied, and intended to be applied, to the police rate, the county rate, payment of principal and interest due in respect of debts contracted under the authority of the local act, for salaries, and various expenses attending the carrying the local act into effect. The defendants did account for so much of the money raised under the rate as was applied, and intended to be applied, to the relief and maintenance of the poor, but objected to account for the residue which was raised for and applied to other purposes: and whether they are bound to do so is in effect the question for our consideration.

*It is not necessary to refer to the local act, as the question turns entirely upon the Poor Law Amendment Act, and applies indeed to [*97 every parish in England where the poor rate is in fact applicable to the payment of the county rate, police rate, or any other expense than the relief and maintenance of the poor.

By the forty-sixth section of the Poor Law Amendment Act, the commissioners may direct the guardians of any parish or union to appoint an officer for the examining, auditing, allowing or disallowing of accounts in such parish or union or in united parishes, and may define and specify and direct the execution of the duties of such officer, and the places and limits within which the same shall be performed. In pursuance of this power, the commissioners did direct the guardians of The Holborn Union, of which the district in question forms a part, to appoint an auditor, whose duties were specified to be (amongst other things) to audit the accounts of the said union, and of the several parishes comprised therein, at proper times; and to examine whether the expenditure in all cases was such as might lawfully be made, and to strike out such payments and charges as were not authorized by some provision of the law, or the orders of the commissioners.

By the forty-seventh section of the Poor Law Amendment Act, every

(a) *Regina v. The Poor Law Commissioners, (Allstonefield Incorporation),* 11 A. & E. 558.

person having the collection, receipt or distribution of the moneys assessed for the relief of the poor in any parish or union, or holding or accountable for any balance relating to the relief of the poor, or the collection or *distribution of the poor rate* of any parish or union, shall, where the orders of the commissioners shall have come in force, as often as the said orders shall

*98] direct, make and render to the guardians, *auditors, or such other persons as by virtue of any statute or custom, or of the said orders, may be appointed to examine, audit, allow or *disallow* such accounts, a full and distinct account in writing of *all moneys*, matters and things committed to their charge, or received, held or expended by them *on behalf of any such parish or union*; and all balances due from any person having the control and distribution of *the poor rate*, or accountable for such balances, may be recovered in the same manner as any penalties are recoverable under that act.

Two things are observable in this section: first, that the accounts are to be rendered to a person appointed either by statute, custom, or the order of the Poor Law commissioners to examine, audit, allow or *disallow* such accounts; and, secondly, that the account is to be of *all moneys*, matters and things committed to their charge, or *received, held or expended* by them *on behalf of the parish or union*; and the balance may be recovered under the act.

The auditors under the local act do not, as already observed, possess the powers required for an auditor under this section: they have no power to *disallow* the accounts; but the auditor appointed under the order of the commissioners does possess the power, and is therefore the person to whom the accounts should be rendered under the terms of the forty-seventh section.

With respect to the accounts themselves, the terms of the forty-sixth and forty-seventh sections of the act include *all moneys* held by the parties accounting *on behalf of the parish or union*, and would therefore apply to *all* the money raised by *the poor rate*: and it is also to be observed that, in *99] the description of the persons *who are to account, given at the early part of the forty-seventh section, persons holding or accountable for any money or balance relating to the relief of the poor, or *the collection or distribution of the poor rate*, are mentioned.

It appears to us, therefore, that by the terms of the forty-sixth and forty-seventh sections of the Poor Law Amendment Act, applied to this case, the defendants were bound to account to the auditor appointed under the order of the Poor Law commissioners, not only for so much of the money raised by the poor rate as was raised for and applied to the relief and maintenance of the poor, but for the whole amount of the money raised by the poor rate; and that the auditor may insist upon ascertaining the amount of the balance of the whole rate in the hands of the accountants. There is but one rate levied, and that professedly for the relief, maintenance, lodging and employment of the poor: and, though the inquiry into the mode of disposing of

the proceeds of the rate may introduce matters foreign to the direct and avowed object of the rate, this is but a necessary incident in the inquiry, and seems to have been contemplated by the legislature when a remedy is provided for the recovery of the balance in the hands of the accountant, obviously meaning the balance of the whole rate levied for the relief, maintenance, lodging and employment of the poor.

We are, therefore, of opinion that the verdict entered for the prosecutor should stand.

Verdict to stand.

FIFE v. BOUSFIELD. May 28.

[*100

The enactments of stat. 31 Eliz. c. 5, s. 2, and stat. 21 Ja. 1, c. 4, s. 2, requiring that, in actions on penal statutes, the venue shall be laid in the county where the offence was committed, do not apply to actions of debt brought by the party grieved to recover a penalty expressly given to him; as for extortion under stat. 1 & 2 P. & M. c. 12, s. 2.

A count on stat. 1 & 2 P. & M. c. 12, s. 2, alleged that plaintiff's horse was distrained damage feasant, delivered to defendant as pound-keeper, and by him impounded and kept in the pound for one whole distress: and that, while the horse was so impounded, defendant, being such keeper, demanded and took from plaintiff, for keeping the same in pound, 3s., being more than the sum of 4d. for one whole distress. *Held* bad, on motion in arrest of judgment, for not laying the act as done against the form of the statute: though the count went on to say, "whereby, and by force of the statute in such case," &c., "an action hath accrued to the plaintiff, being the party grieved, to demand," &c., 5l., "and also the further sum of 2s. 8d., the said last mentioned sum being the sum of money which the defendant took above the sum of 4d. for such whole distress."

DEBT on stat. 1 & 2 P. & M. c. 12, s. 2. Venue, Middlesex. The declaration stated that W. M. Coulthurst, before the committing, &c., to wit on, &c., took and distrained a certain horse or mare of plaintiff then doing damage on the property of the said W. M. C., and then impounded the said horse or mare as a distress for such damage; and the said W. M. C. then conveyed the said horse or mare to a certain public pound, to wit at Streatham, in the county of Surrey, of which the said defendant then was the keeper, and then delivered the said horse or mare as such distress to defendant as such pound-keeper; and defendant, so being keeper as aforesaid, then impounded the said horse or mare, and kept the said horse or mare in the said pound for one whole distress; and defendant, so being such keeper as aforesaid, afterwards, and whilst the said horse or mare was so impounded as aforesaid, to wit on, &c., demanded and then took from plaintiff for keeping in pound the said distress, to wit, the sum of 3s., being more than the sum of 4d. for one whole distress; whereby, and by force of the statute in such case made and provided, an action hath accrued to plaintiff, being the party grieved, to demand and have from defendant the sum of 5l., and also the further sum of 2s. 8d., the said last mentioned sum being the sum of money which defendant took above [*101 the sum of 4d. for such whole distress. Yet defendant, although often requested so to do, hath not paid to plaintiff the said sums of 5l. and 2s. 8d. or either of them, or any part thereof, and the same are and each of them

is wholly unpaid. Counts for money had and received, and on an account stated.

Pleas. To the first count, Nil debet, (a) (by statute.) To the other counts, Nunquam indebitatus. Issues thereon. :

On the trial, before WIGHTMAN, J., at the sittings in Middlesex after Trinity term, 1843, it appeared that the alleged extortion was committed at Streatham in Surrey; and the defendant's counsel contended that the plaintiff must be nonsuited, for that the venue was local, the action being brought under a penal statute. The learned judge gave leave to move that a nonsuit might be entered; and the plaintiff had a verdict on the first count: on the others the verdict was for the defendant.

In Michaelmas term, 1843, *Kelly* obtained a rule to show cause why a nonsuit should not be entered on the objection taken at the trial; or judgment arrested, on the ground that the declaration did not state the alleged offence to have been committed against the form of the statute. In last Easter term, (b)

Platt and *C. C. Jones* showed cause. First; it is true that by stat. 31 Eliz. c. 5, s. 2, "the offence against any penal statute" must not, in a declaration, "be laid to be done in any other county, but where
*102] the contract, or other matter alleged to be the offence, was in truth done:" and stat. 21 Ja. 1, c. 4, s. 2, makes a similar provision. But these enactments apply to informations and suits by common informers, not by parties grieved. The title and preamble of each act shows that such informers were in contemplation. The distinction here relied upon has been taken in many cases where the courts have held that a party grieved recovering under a penal statute might have his costs, but an informer might not. *Eaton v. Barker*, 1 Ventr. 133; *Company of Cutlers v. Ruslin*, Skinn. 363, 367; *Corporation of Plymouth v. Collings*, Carth. 230. It is laid down in 1 Tidd, 430, 9th ed., that neither stat. 21 Ja. 1, c. 4, nor stat. 31 Eliz. c. 5, "extends to actions brought by the party grieved;" and in Bull. N. P. 196, (cited by Tidd,) that "no suit by a party grieved is within the restraint of" stat. 21 Ja. 1, c. 4: and the distinction in favour of such party, under stat. 31 Eliz. c. 5, was recognised in *Calliford v. Blandford*, 1 Show. 353, (c) and *Spieres v. Frederick*, Willes, 443, (d) Secondly, the narrative in the first count sufficiently shows that an offence against stat. 1 & 2 P. & M. c. 12, s. 1, is charged, though the words "against the form of the statute" are not used. And the count goes on to say "whereby, and by force of the statute in such case," &c., "an action hath accrued," &c. Even if the objection would have been good on special demurrer, it is not good in arrest of judgment.

*103] *Taprell*, contra. First; the distinction between a common informer and the party grieved is not supported by the language of stat.

(a) See *Earl Spencer v. Swannell*, 3 M. & W. 154.

(b) April 22d, 1844. Before Lord Denman, C. J., Patteson and Wightman, Js.

(c) S. C. as *Calliford v. Blandford*, 4 Mod. 129, Carth. 232, Comb. 194, Holt, 522.

(d) Note (a) to *Mayor of Plymouth v. Werring*.

31 Eliz. c. 5, s. 2, or 21 Ja. 1, c. 4, s. 2. The words of both clauses are quite general; and the law must be taken from the enacting clauses; the title which has been referred to, is no part of the statute. The being sued in a wrong county is as likely to produce inconvenience where the plaintiff is the party grieved as where he is an informer. In *Barber v. Tilson*, 3 M. & S. 429, and *Whitehead v. Wynn*, 5 M. & S. 427, S. C. 2 Chitt. Rep. 420, it was held that stat. 31 Eliz. c. 5, s. 2, was not restrained in the generality of its application as to venue by stat. 21 Jac. 1, c. 4, s. 2: and in *Earl Spencer v. Swannell*, 3 M. & W. 154, 163, PARKE, B., delivering the judgment of the court, refers to those cases, and says, of the latter clause: "Its effect is, with respect to such informations" (as are mentioned in sect. 1 of stat. 21 Ja. 1, c. 4,) "to re-enact the provisions of the 31 Eliz. c. 5, s. 2, with some alteration as to the mode of taking advantage of the objection, and to enforce the laying the venue in the proper county." The observation cited on the other side from Bull. N. P. 196, is grounded on *Calliford v. Blawford*, 1 Show. 353; but, by a note in 1 Show. 353, note (c), (a) it appears that that case was carried to a Court of Error, and a majority of the judges held that the clause there in question did not bind the party grieved, for "that where the informer ought to have the whole penalty, the statute 31 Eliz. c. 5, does not extend to it, because it is not within the words of the act, and penal acts are not to be extended by equity;" a ground of decision quite *inapplicable here. In *Pope v. Davis*, 2 Taunt. 252, an action on 1 & 2 P. & M., c. 12, s. 1, [*104 at the suit of the party grieved, it was taken for granted that the venue was local. (On the second point he was stopped by the court.)

LORD DENMAN, C. J. On the first point I have much doubt. On the second, it is contended that the averment "*contra formam statuti*" may be dispensed with, because the words of the declaration show that the statute has been violated: but that kind of answer would put an end to all objections founded on such a defect. *Lee v. Clarke*, 2 East, 333, (b) is a direct authority on this point. (c) The first objection, therefore, must prevail. If the parties wish for our opinion on the other, we will take time to consider it.

PATTESON and WIGHTMAN, Js., concurred.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the court.

This was an action of debt, given to the party grieved by stat. 1 & 2 P. & M. c. 12, s. 2, for taking more than 4*d.* for impounding and keeping a distress, with a count for money had and received. Upon the trial a verdict was taken for the plaintiff upon the first count, and for the defendant upon the second. The venue was laid, and the cause was tried in Middlesex; but the offence was committed in Surrey: and a rule nisi was obtained,

(a) See in *Chance v. Adams*, 1 Ld. Raym. 78.

(b) See the judgment of Lawrence, J.

(c) Taprell here cited *Wells v. Iggulden*, 3 B. & C. 186.

*105] upon leave reserved, to enter a nonsuit, on the ground that the venue was local, either by stat. 31 Eliz. c. 5, s. 2, or by stat. 21 Jac. 1, c. 4, s. 2.

We are, however, of opinion that neither of those statutes applies to actions of debt brought by the party grieved to recover a penalty expressly given to him. Both stat. 31 Eliz. c. 5, and 21 Jac. 1, c. 4, have the same object, the regulation of proceedings by informers; and, though some of the sections are in terms so general as to be applicable to all penal actions, it may be considered now to be settled that neither the first of those statutes, nor the first and second clauses of the second, extend to penal actions by the party grieved. With respect to the statute of Elizabeth, it has been expressly determined that it applies to common informers only, and not to a party grieved; *Allen v. Stear*, Cro. Eliz. 645; *Calliford v. Blawford*, 1 Show. 353; and the effect of the second section of stat. 21 Jac. 1, c. 4, is, as observed by Mr. Baron PARKE in giving judgment in the case of *Earl Spencer v. Swannell*, 3 M. & W. 163, to re-enact the provisions of stat. 31 Eliz. c. 5, s. 2, with some alteration as to the mode of taking advantage of the objection, and to enforce the laying the venue in the proper county: and the second section has, not only in that case but in *Barber v. Tilson*, 3 M. & S. 429, been determined to apply only to cases of proceedings by informers. And Bull. N. P., page 196, is to the same effect. In the case of *Pope v. Davis*, 2 Taunt. 252, the point was not made nor attended to either in the argument or the judgment, though the action was upon stat. 1 & 2 P. & M. c. 12; and the question was in which of *two counties

*106] the venue should be laid. We are therefore of opinion that so much of the rule as relates to the entry of a nonsuit should be discharged.

But the rule was also for arresting the judgment upon the first count: and we are of opinion that so much of the rule as relates to the arresting of the judgment should be made absolute. The first count of the declaration is upon stat. 1 & 2 P. & M. c. 12, s. 2, but does not conclude "against the form of the statute," nor contain that allegation in any part of it, nor show in terms that the offence charged upon the defendant was against the statute. The case of *Lee v. Clarke*, 2 East, 333, is a decisive authority that this is a fatal objection: and the rule, therefore, for arresting the judgment must be made absolute.

It was necessary to examine this point, because the defendant had obtained a rule for a nonsuit, which would have been much more beneficial to him than arrest of judgment. But we have already declared our opinion that the rule for the latter alternative must be absolute.

Rule absolute to arrest judgment.

*DOE on the demise of The Marquis of ANGLESEA v. The Churchwardens and Overseers of RUGELEY. May 28. [*107]

Land was demised to trustees for parish R., they covenanting to build a workhouse thereon, and to use, occupy, possess and enjoy the premises for the sole use, maintenance and support of the poor of R., and not to convert the building or the land, or employ the profits thereof, to any other use, intent or purpose whatsoever. Proviso for re-entry on breach of the covenant.

The house was built, and, together with the land, used agreeably to the covenant. Afterwards stat. 4 & 5 W. 4, c. 76, passed; and the Poor Law commissioners incorporated parish R. in a union, and removed all the paupers to the union workhouse. The workhouse of R. became uninhabited, and was locked up; and the land was let at a rack rent, which was applied in aid of the poor rates. On ejectment brought (three years afterwards) for breach of the covenant,

Held, that no breach of the covenant appeared: but *Seem* that a breach caused by the compulsory operation of the statute would have been thereby excused.

By consent, and the order of a judge, (December, 1843,) a special case was stated in this cause, for the opinion of the court.

The case set out an indenture, dated 31st August, 1778, between Henry Lord Paget, of the one part, and certain trustees on behalf of the inhabitants and parishioners of the parish of Rugeley in Staffordshire, of the other part. After reciting that the maintenance and support of the poor of that parish had been increased, and the burden thereof had become grievous, &c., which had in a great measure arisen from the want of a proper house for the reception of the poor, and that many of the inhabitants had petitioned Lord Paget, setting forth the above grievance, and requesting him to grant them eleven acres of land on his chase of Cannock Wood to answer the above purpose, it was witnessed that, for the considerations aforesaid, and in consideration of the rents, covenants, and agreements after mentioned, Lord Paget demised to the trustees, their executors, &c., all that tract or parcel of land situate in the parish aforesaid, in and upon the chase of Cannock Wood, in a place there called, &c., containing eleven acres of land, abutting, *&c.; habendum to the trustees, their executors, &c., from March 25th, 1778, for one thousand years, upon trust as [*108] aforesaid, yielding, &c., to Lord Paget, his heirs, &c., a yearly rent of 5s.; which rent the trustees, for themselves, their joint and several heirs, executors, &c., covenanted to Lord Paget, his heirs, &c., to pay at the days named. The trustees further covenanted that they, some or one of them, "shall and will, on or before the 24th day of June next ensuing the date thereof, build, or cause to be built, a house upon some part of the hereby demised premises for the reception of the poor people that become chargeable to the said parish of Rugeley, and shall and will, during the continuance of these presents, use, occupy, possess, and enjoy the hereby demised premises, and every part thereof, for the sole use, maintenance, and support of the poor of Rugeley aforesaid, according to the true intent and meaning of the parties hereto, and shall not convert the aforesaid intended building, or the land hereby demised, or employ the profits thereof, to any other use,

intent or purpose whatsoever." Proviso for re-entry if the rent should be behind, &c., or if the trustees, their executors, &c., should without license sell, assign, transfer, or otherwise part with their or any of their estates, interest or term of or in the premises or any part thereof, or if they or any of them, their or any of their heirs, executors, &c., "do not in all things well and truly observe, perform, fulfil and keep all and singular and every the covenants herein contained." Covenant for quiet enjoyment.

This lease was duly executed: and, within the time prescribed in the lease, a workhouse was erected on the demised land, partly by subscription, and partly at the cost of the inhabitants; and the eleven acres of land *109] were enclosed and subdivided by fences and cultivation. From that time until after the day on which the order of the Poor Law commissioners hereinafter mentioned came into operation, the workhouse so built was inhabited by paupers under the superintendence of a governor, who resided on the premises: and the land became beneficial to the parish by furnishing employment to paupers, who cultivated it under the management of the churchwardens and overseers of the poor for the time being. From the date of the lease until the time last mentioned, the parish officers, by the permission of the lessees, exercised the sole control over the property on behalf of the parish, and paid the rent reserved by the lease to the lessor or his representatives up to 25th March, 1839, and have been ever since ready and have offered to pay the same as it has become due, according to the terms of the lease.

By an order of the Poor Law commissioners for England and Wales, bearing date 25th November, 1836, the commissioners ordered and declared that certain parishes, &c., among which was the parish of Rugeley aforesaid, should, on 21st December then next, be, and thenceforth should remain, united for the administration of the law for the relief of the poor, by the name of The Lichfield Union, and should contribute and be assessed to a common fund for purchasing, building, hiring or providing, altering or enlarging, any workhouse or other place of reception and relief of the poor of such parishes, &c., or for the purchase of any lands or tenements, under and by virtue of the provisions of the said act, of or for such union, and for the future upholding, &c., of such workhouses or places.

After the day on which the above order came into operation, until May, 1840, the said property was, under *the control and by the sanction *110] of the proper authorities in that behalf, used for the poor of the union as it had previously been by the poor of the parish. In May, 1840, all the poor then upon the said property were, by order of the proper and competent authorities, removed therefrom to a workhouse which had been built and provided at Lichfield for the said union. Since that period all the poor of the union have, by order of the proper authorities, been supported in the workhouse at Lichfield: and the workhouse at Rugeley has been in consequence uninhabited and locked up. A garden attached to it, and the rest of the land demised, have been and are in the possession of

two several tenants at a rack rent under the churchwardens and overseers of the parish; which rent has been and is applied in aid of the poor rates of the parish.

The lessor of the plaintiff is heir at law and legal representative of the grantor of the lease.

The question for the opinion of the court was whether, under the above circumstances, the lessor of the plaintiff has a right to re-enter by virtue of the proviso in the lease of 1778. The parties agreed that, at the request of either, the case might be turned into a special verdict; the record, for such purpose, to be made up, by consent, in such manner as should be necessary.

The case was argued last Easter term.(a)

Whateley for the plaintiff. The contract of the defendants under this lease has not been kept; and the reversioner may re-enter. The lessor, who had the *jus disponendi*, clearly intended that the land should be used for the purposes of a workhouse, and not to aid the poor rate in other ways. Lord TENTERDEN says, in *Doe dem. Davis v. Elsam*, [*111 Moo. & M. 189: "I do not think provisos of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts;" that is, "according to fair and obvious construction, without favour to either side." [PATTERSON, J. The paupers have been removed from the workhouse by compulsion of law.] In *Lucy v. Levington*, 1 Vent. 175, cited 2 Bac. Abr. 161, 7th ed., *Conditions* (Q) 2, the defendant covenanted with J. S. to levy a fine, and that J. S. should enjoy the lands against all claiming under V.: in an action on the covenant it was alleged that persons claiming under V. entered upon J. S.: and the defendant pleaded that at the time of the covenant he had good title by virtue of certain fines, but that an act of parliament passed, making and declaring the fines void and declaring the claimants under V. entitled, by reason whereof they entered; and this was held no defence. Here, if the premises can no longer be occupied as a poorhouse, they ought to return to the lessor.

J. W. Smith, contrà. First, the covenant has not been broken: secondly, if it has, the breach being caused by an act of parliament, there is no forfeiture. 1. The words of the covenant, "shall" "use, occupy, possess and enjoy the hereby demised premises" "for the sole use, maintenance and support of the poor of Rugeley," are explained by the negative ones that follow, "and shall not convert the aforesaid intended building, or the land hereby demised, or employ the profits thereof, to any other use;" [*112 which show that the restriction was not meant to be literally that which seems expressed in the first part of the clause. As to the workhouse, it has not been converted "to any other use:" the churchwardens

(a) April 26th. Before Lord Denman, C. J., Patterson, Williams, and Wightman, Ja.

and overseers retain the control over it; and the poor, or part of them, may at any time be brought back. As to the land, it is made available for the purposes of the lease as nearly as the circumstances permit: and the words, "shall not convert" "the land," "or employ the profits thereof," to any other purpose, imply that a state of things was contemplated in which the ground might be turned to profit otherwise than by the occupation and labour of the paupers. In the earlier part of the covenant, the words "possess and enjoy" are used as well as the word "occupy." No other distinction is made between holding and receiving the profits than in stat. 3 & 4 W. 4, c. 27, s. 5, where "profits" is equivalent to "rent." The lease contains no covenant against underletting. Where a condition is not strictly fulfilled, nonperformance is excused "if the condition be performed in substance," or "as near the intent of the condition as can be;" Com. Dig. *Condition*, (L 1.) 2. If, however, the acts done are contrary to the covenant, the legal compulsion is an excuse. "Where H. covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant: so if H. covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed;" *Brewster v. Kitchell*, 1 Salk. 198. It may also be collected from Com. Dig. *Condition*, (D. 1.) (L. 13,) and 4 Bac. Abr. **Leases and* *113] *Terms for Years*, (T. 2,)(a) that a forfeiture does not take place where performance of the covenant is made impossible by act of parliament. *Lucy v. Levington*, 1 Ventr. 175, was decided before *Brewster v. Kitchell*, 1 Salk. 198; and the defendant Levington had pleaded that, before the act of parliament, he had a good and indefeasible title by virtue of certain fines, which fines the act, (13 Ca. 2,) declared void, as having been extorted by armed force; and HALE, C. J., said, in his judgment, "nor has the defendant reason to complain, for the act was made because of his own fraud and force." *Doe dem. Lord Grantley v. Butcher*(b) is a direct authority for the defendant on this point.

Whateley in reply. The law laid down in *Brewster v. Kitchell*, 1 Salk. 198, does not apply to the case where there is a covenant for re-entry if a condition be broken; and no case has been cited where such a covenant was held not to operate when the express terms of a demise were infringed, as in this instance. (*J. W. Smith* referred to *Doe dem. Goodbehere v. Bevan*, 3 M. & S. 353, and *Doe dem. Mitchinson v. Carter*, 8 T. R. 57.)(c)

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the court.

This was an ejectment to recover possession of a building and land demised to trustees for the parish of Rugeley, on the ground of a forfeiture

*114] by reason of *breach of a covenant, contained in the lease, that the lessees should use, occupy, possess and enjoy the demised premises

(a) See p. 885, 887.

(b) See p. 115, note (a), post.

(c) See S. C. 8 T. R. 300.

for the sole use, maintenance, and support of the poor of Rugeley, and should not convert the building or the land demised, or the profits thereof, to any other use, intent or purpose whatsoever.

Until the month of May, 1840, the building was used as the workhouse, and the land as a garden, which was cultivated by the paupers: but, at that time, the paupers were removed to a Union workhouse at Lichfield in pursuance of the order of the Poor Law commissioners; and the workhouse at Rugeley has been shut up since that time, and the garden and land have been let at a rent which has been applied in aid of the poor rate. This is the alleged breach of covenant by which it was contended that the lease was forfeited.

But we are of opinion that there has not been any breach of the covenant, but that it has been substantially performed. The premises never have been used for any other purpose than that of the maintenance and support of the poor of Rugeley; and, though the orders of the commissioners have occasioned for a time a cessation of the actual occupation of the premises by the paupers, such an occupation, either by casual poor or otherwise, may at any time be resumed. What was the precise date of the breach of covenant? To this question no satisfactory answer was given upon the argument. But, even if the condition were not performed, it appears to us that the non-performance would in this case be excused, as being by act of law, and involuntary on the part of the lessees; and the cases cited in the argument, and to be found in *Bac. Ab. tit. Conditions*, (Q) 2, vol. 4, p. 161, &c., **Com. Dig. tit. Condition*, (L 1,) and the case of *Brewster v. Kitchell*, 1 Salk. 198, support this view of the case. [*115]

Our judgment, therefore, is for the defendants.

Judgment for defendants.(a)

(a) DOE on the several demises of Lord GRANTLEY and SHRUBB v. BUTCHER and others.

Land was demised for a thousand years by indenture (A. D. 1793) to A. and B., the latter described as visitor and guardian of the poor of the parish of C., their successors and assigns, under stat. 22 G. 3, c. 83, (Gilbert's act,) for the purpose of erecting a poorhouse thereon, and occupying and cultivating the same for the use and benefit of such poorhouse, and of the poor of C. and such other parishes as should be united therewith for the purposes of the act. Proviso for re-entry if C. and all the other parishes which should or might at any time be so united should of themselves *discontinue* to adopt the provisions of the statute. Further proviso that, if, during this demise, the legislature should repeal Gilbert's act, so that the poor of the several parishes should no longer be permitted to remain under the care of the visitor and guardians of such parishes, it should be lawful for the visitor and guardians, their successors and assigns, yielding up the land to the lessors, to pull down the said poorhouse and carry away the materials.

The house was built; and C. and other parishes adopted the provisions of the act; and C. continued to follow them till the making of the after mentioned order: but the other parishes seceded from the union. In 1836, the Poor Law commissioners incorporated parish C. in the Hambleton Union, and ordered all the paupers to be removed to the union workhouse; after which no paupers were received into the poorhouse of C. but persons requiring only out-door relief; and the parish officers issued a notice proposing to let part of the house and the land. *Held*, no forfeiture under the first proviso.

EJECTMENT for messuages, land, &c., in the parish of Cranley, Surrey. Demise, 1st October, 1837. By consent, and order of a judge, a special case was stated for the opinion of this court.

The case stated an indenture, dated 19th September, 1793, made between Grace, Lady Grantley, relict of the late Fletcher, Lord Grantley, lady of the manor of East Bramley, Surrey, and William, Lord Grantley, heir at law of the late lord, of the one part, "and Michael King, of Cranley, Surrey, yeoman, and John Tickner, of Cranley aforesaid, yeoman, visitor, and guardian of the poor of the parish of Cranley aforesaid under and by virtue of an act," &c., "made," &c. (22 G. 3, c. 83,) "of the other part;" whereby the first mentioned parties demised "to the said M. King and John Tickner, their successors and assigns," a piece of ground, part of the waste of the manor, situate, &c., "for the purpose of erecting a poorhouse or workhouse or other buildings thereon, and occupying, cultivating, and improving the same for the use and benefit of such poorhouse and the poor persons within the said parish, and such other *116] parish or parishes as should be united therewith for the purposes of the above * mentioned act of parliament." Habendum, &c. from 25th March then last for a thousand years, at the yearly rent of 12s. Proviso, "that, if and when the said parish of Cranley, and all other the parish or parishes which shall or may at any time hereafter during this demise become united therewith for the purposes aforesaid, shall of themselves discontinue to adopt the provisions of the aforesaid statute, that then and from thenceforth the said term and estate hereby granted shall cease," and the lessors, and such other person as shall then be entitled, may re-enter. Further proviso, and covenant by the lessors, "that, if the legislature of this kingdom shall at any time hereafter during the continuance of this demise or lease repeal the said act of parliament or statute, so that the poor of the said parish of Cranley, and of such other parish or parishes as may become united therewith for the purposes above mentioned, shall no longer be permitted to continue under the care and management of the visitor and guardians of such parishes, that then it shall and may be lawful to and for the said visitor and guardians, their successors or assigns, yielding and surrendering the said piece of ground to the said Grace, Lady Grantley, William, Lord Grantley, or such other person," &c., "to pull down, carry, and take away the said poorhouse or workhouse, and all the buildings that shall be erected or built on the said piece or parcel of ground, and to sell and dispose of the materials thereof, any thing herein contained," &c. "notwithstanding."

• The case further stated that, soon after the execution of the indenture, the parish of Cranley built a workhouse on part of the land so demised to the visitor and guardian of the poor of the said parish, and also took in and enclosed altogether eleven acres of land; which house and land were the premises claimed in this action. Subsequently, other parishes united themselves to Cranley, and adopted the provisions of stat. 22 G. 3, c. 83. These parishes afterwards seceded from the union: but Cranley continued to adopt the provisions of the statute; and its poor remained under the care of a visitor, guardian and other officers elected in conformity thereto, till 1836.

The Poor Law commissioners, by an order, dated February 22d, 1836, declared and ordered that Cranley should be united with certain other parishes to form the Hambleton union, and that guardians should be elected for such union. During 1835 and 1836, a poorhouse for that union was built in the parish of Hambleton; and, under the Poor Law Amendment Act, the parish officers of Cranley were directed to remove the poor of that parish from the workhouse there to the said poorhouse of the Hambleton union; and accordingly all the paupers who, until such direction, were under the care of the said visitor, &c. were, before the day of the demise in the declaration, removed to the Hambleton poorhouse. Between the time of such removal and the day of the demise in the declaration, the only paupers received into the Cranley workhouse were persons requiring out-door relief only; and such paupers alone continue in that workhouse, receiving such out-door relief, and no other.

*117] • After the formation of the Hambleton union, the parish of Cranley issued a notice, proposing to let "the under part of the workhouse, not required for the use of the paupers," with the outbuildings, &c., and eleven acres of arable and meadow land. Tenders, sealed, to be addressed to the churchwardens, and delivered at the vestry room, &c.

Before the day of the demise laid in the declaration, Lord Grantley, being then the lord of the manor and entitled to the wastes, demanded possession.

The question for the opinion of this court was, whether Lord Grantley was entitled to recover the whole or any part of the premises. Judgment was to be entered (as more particularly stated in the case) according to the decision of the court.

In Easter term, 1840, (May 1st: before Lord DENMAN, C. J., LITTLERDALE, PATTERSON, and COLERIDGE, J.)

Platt, for the plaintiff, contended that, by the removal of the paupers and the changed mode of using the premises, a forfeiture had arisen. [COLERIDGE, J. You give no force to the words "shall of themselves discontinue." Lord DENMAN, C. J. Those words are used in the demise; and then comes an act of parliament under which the paupers are compulsorily removed.] The facts show that the parishioners of Cranley did "of themselves discontinue" to adopt the provisions of Gilbert's act. [COLERIDGE, J. The other parishes withdrew; Cranley con-

tinued.] Gilbert's act was unrepealed; but Cranley could not any longer adopt its provisions after the order of the commissioners. [PATTERSON, J. If it had been repealed, you would have had no right of entry under the first proviso. COLERIDGE, J. The second proviso would, in that case, have entitled them to carry away the materials of the buildings. Your argument places them in a worse position than if that had happened.] Lodging their out-door paupers in the house was an alteration which they had no right by the lease to make. [Lord DENHAM, C. J. It was not properly discontinuing to adopt the provisions of the statute.] If it could be held that the term was not forfeited, a question would arise, who could have it. The premises are not vested in the officers of the single parish of Cranley, within stat. 59 G. 3, c. 12, s. 17. [PATTERSON, J. It is clear that the parish of Cranley, as far as regarded itself, adopted the provisions of Gilbert's act: and by that act (s. 21,) the visitor and guardian of the single parish might hold the premises.] Their functions would cease when stat. 4 & 5 W. 4, c. 76, came into operation. [PATTERSON, J. It does not appear whether a dissolution of the first union was consented to according to stat. 4 & 5 W. 4, c. 76, s. 32. COLERIDGE, J. The other parishes seceded. Cranley could not help their discontinuing to act as a union. Then would not the persons in Cranley who took as parties to the demise still be tenants, at least from year to year? Lord DENHAM, C. J. *Does the case state that they are still living!] [*118 Nothing is said as to that. The indenture was executed in 1793.]

Pashley, contra. The parishioners of Cranley did not "of themselves discontinue." If other parishes did so discontinue, but this did not, the case is not within the words of the proviso. And, even if there was a discontinuance by Cranley within the meaning of the proviso, the act was one which the commissioners had, by statute, an absolute power to enforce; *Rex v. The Poor Law Commissioners, in re Newport Union*, 6 A. & E. 54; and, if a condition is broken under compulsion of a statutory authority subsequent to the making of the covenant, no forfeiture ensues. It has been so held in the case of an assignment by operation of law; note (d) to *Duppa v. Mayo*, 1 Wm. Saund. 288 b, 6th ed., and *Doe dem. Mitchinson v. Carter*, 8 T. R. 58, and other authorities there cited. If a grant is made on a condition which becomes contrary to law, the grant is absolute; *Abbot of Westminster v. Clerke*, Dyer, 26 b, 28 b, pl. 186, *Brewster v. Kitchell*, 1 Salk. 198, 8 C. 1 Ld. Ray. 317, 321, *Atkinson v. Ritchie*, 10 East, 530, 534, 535. The authorities exercised under Gilbert's act were not revoked by the passing of stat. 4 & 5 W. 4, c. 76. (He was then stopped by the court.)

Lord DENHAM, C. J. This case is put for the plaintiff simply on the ground of forfeiture. Now I think the proceeding on the part of the parish is not, strictly, within the clause of forfeiture. And, supposing that the union under Gilbert's act was dissolved, that was in 1836. The occupation under the demise has continued ever since. We must presume that the parties who originally took are still living. It was for the plaintiff to make out a case entitling him to recover; and, he not doing so, the defendants are entitled to judgment.

LITLEDALE, J., had left the court.

PATTERSON, J. The second proviso is, that, if the legislature shall repeal Gilbert's act, so that the poor of Cranley and the other parishes shall no longer be permitted to continue under the visitor and guardians of such parishes, it shall be lawful for the visitor and guardians, yielding up the ground to the lessors, to take away the materials of the workhouse: but it is not said that they shall do so: and the case falls within this rather than the first proviso. What the consequence may be, we are not bound to consider. The defendants are entitled to judgment.

COLERIDGE, J., concurred.

Platt then asked leave to have the case amended, saying that the parties wished to have the opinion of the court as to the title.

*The Court gave leave to restate the case, if the parties could agree.

[*119]

Judgment for defendants, nisi.

The case was not restated. Lord Granley gave up the action, paid costs, and bought the property of the parish. (So stated by J. W. Smith, in arguing the case of *Doe dem. Lord Anglesea v. Churchwardens of Rugeley* (anth. p. 107,) on the authority of Lumley, assistant secretary of the Poor Law commissioners.)

The QUEEN v. The Inhabitants of SHIPSTON UPON STOUR.

May 29.

On appeal against an order of removal, it appeared, by the copies of examinations sent, that the examination of R. (which was essential to the settlement) was alleged in the jurat to be taken and sworn before, and was signed by, two parties, whose names only, without any description of their office, were given. The heading did not show before whom the examination was taken; and the name of the party examined appeared in the heading only. *Held*, that the order must be quashed:

Although, on the same sheet of paper with, and preceding, R.'s examination, was an examination of S, headed "The examination of S, the pauper, taken upon oath before us, two of her majesty's justices," &c. (describing their character properly,) the jurat of which was signed with the same names as the other examination. and although the headings and jurats gave the same date to each examination; and the examination of R. mentioned S. as the pauper.

On an appeal against an order of two justices, removing Sarah Sutton, and her illegitimate child William, from the parish of Shipston upon Stour in Worcestershire to the parish of Atherstone upon Stour in Warwickshire, the sessions quashed the order, subject to the opinion of this court upon the following case.

By the order, bearing date 21st December, 1842, William Dickens, Esq., and H. Townsend, clerk, two justices of the peace acting in and for the county of Worcester, whose names are thereunto set and seals affixed, upon examination of the premises upon oath, and other circumstances, adjudged the place of the last legal settlement of Sarah Sutton, single woman, and her illegitimate child William, to be in the parish of Atherstone upon Stour, in the county of Warwick. The examinations sent to the appellant parish with the said *order of removal were, so far as is material to the *120] decision of the court, as follows. "The examination of Sarah Sutton, the pauper, taken upon oath before us, two of her majesty's justices of the peace in and for the county of Worcester: who, upon her oath, saith," &c. The examination stated that the pauper had gained no settlement in her own right, and that, seven weeks ago, she was delivered of William, a male bastard child, in Shipston upon Stour.

"The mark of

X

SARAH SUTTON.

"Taken and sworn before us, this thirty-first day of December,
one thousand eight hundred and forty-two.

WILLIAM DICKENS, H. TOWNSEND."

Then immediately followed, on the same sheet of paper, "The examination of Patience Randall, the wife of Thomas Randall, of Shipston upon Stour, in the county of Worcester, labourer, taken this thirty-first day of December, one thousand eight hundred and forty-two: who, upon her oath, saith," &c. This examination stated that "the pauper Sarah Sutton," was

witness's daughter, and was born at the parish of Atherstone upon Stour, in Warwickshire, and illegitimate.

“ The mark of

X

PATIENCE RANDALL.

“ Taken and sworn, this thirty-first day of December, one thousand eight hundred and forty-two, before us.

WILLIAM DICKENS, H. TOWNSEND.”

Those two examinations filled the second and third *pages of the sheet of paper; the first page of which was occupied by the [*121 notice of chargeability and order of removal. The whole was duly sent by the overseers of the respondent to the overseers of the appellant parish.

The case then stated the grounds of objection upon which the sessions grounded their decision; the two which alone are material to the judgment of the court were, in substance, as follows.

2. That the examination of Sutton contains no legal evidence showing that either she or her child is settled in Atherstone upon Stour.

3. That it does not appear, by the said examinations, that the examination of Randall was taken before two of her majesty's justices of the peace of the county of Worcester, nor that she was examined before two justices of the peace of the county of Worcester, touching the place of the legal settlement of Sutton, or before the justices who signed the order of removal.

Selfe and Beadon in support of the order of Sessions. The examination of Patience Randall does not appear to have been taken by competent authority. The parties taking it appear merely as individuals in no official character. It is true that the examination of Sarah Sutton, which is on the same sheet, does appear, by the heading, to have been taken before justices having jurisdiction, whose names agree with those signed to the examination of Patience Randall. But that is not sufficient. The heading of the first examination is not general, but states only that the examination of Sarah Sutton was taken before two justices. The court cannot see that the identity of the names is not accidental. And there is nothing to show that the same sheet does not contain proceedings *taken before different parties, on the same day. In *Rex v. Stepney*, Burr. S. C. 23, an order was made by parties styling themselves justices “for the county aforesaid,” two counties having been named: and it was held bad. The court, in aiding faults of description of this kind, has never gone farther than in *Regina v. Silkstone*, 2 Q. B. 520, where the jurat was, “sworn before me,” “and I do hereby certify,” &c., to which were attached the signatures of two justices: and it was held that each justice might have adopted the jurat for himself. There *WILLIAMS, J.*, seemed to think that the order could be supported only because the form of the objection appeared to admit that the examination was rightly taken. To sustain this order, would be going much farther. Examinations are now construed as strictly as orders.

Whitmore and Huddleston, contra. The original examinations are not

sent, under sect. 79 of stat. 4 & 5 W. 4, c. 76, but only copies. It cannot be necessary that in such copies there should be transcribed the formal part of the instrument: enough appears here to give the information which the section requires. When the second examination is looked at together with the first, the names sufficiently indicate what the jurisdiction is; and the second examination, by mentioning "the pauper Sarah Sutton," connects itself with the first. The court will give a reasonable intendment to what appears, as in *Regina v. Silkstone*, 2 Q. B. 520, and *Regina v. Rotherham*, 3 Q. B. 776.

Lord DENMAN, C. J. There is much more in the second objection than might be supposed at first sight. *The examination of Patience 123*] Randall appears to have been taken in this way. (His lordship then read so much of the case as related to the point.) Now, neither in the examination nor in the jurat is it stated that the examination was taken before persons who had authority to take it. In one part of the argument it was urged that this deficiency was immaterial; for that a copy only of the examinations is transmitted under sect. 79 of stat. 4 & 5 W. 4, c. 76; and that this is substantially done, if the copy contain the facts which the deponent has sworn to. I am not at all sure that this would be a compliance with the act. But, supposing it to be so, we must assume here that that which was sent as a copy was a complete copy of the examination. That of the pauper is correct, heading and all. But, if the second stands alone, it is quite imperfect: and, in my opinion, it does stand alone. There is no reference to the former: nothing in it to show that the parties taking the examination were other than private individuals. It is true that the second examination is on the same paper with the first, which is properly headed. But that is only one of several circumstances from which the inference is suggested, that the persons before whom the deposition was taken had authority to take it, such as the identity of name in the parties examined as well as that of the persons signing the jurat, and possibly their handwriting. I think that such an important matter as the authority to administer an oath on the subject ought to be distinctly stated, and not left to inference at all.

PATTESON, J. I think we must hold that the copies here are full and true. 124*] It is said that copies of the *jurats need not have been sent. Suppose the jurats of both the examinations had been omitted, and copies of the bodies of the examinations only sent: we should then have the same objection in this form; that it would appear that the first examination was taken before two justices, but only that the second was in some way taken. Again, we could not leave out the commencement of the examinations; for it is there only that the deponent's names appear so as to make the examinations intelligible. Taking then the copy to be correct, is this second examination one upon which the deponent could be indicted for perjury? If not, it is not a legal examination. Taken by itself, I should say that it could not be the subject matter of an indictment for perjury. And, if we were to allow it to be connected with the previous examination be-

cause the two are on the same paper, we should next be asked to apply the same rule to affidavits. If one affidavit purported to be sworn "before me a commissioner," &c., it would be urged that any affidavit on the same paper, coming after that, must be taken to be so sworn also, though the words "a commissioner," &c., were omitted. It is impossible to say to what extent we might be required to go.

WILLIAMS, J. At first I was much struck with Mr. *Whitmore's* remark, that the case shows only the copy transmitted to the appellants, so that we have no knowledge that the original has not a proper heading. But, upon consideration, I think that copies of the whole documents appear to have been sent: and then comes the question whether the particularity of the first examination is not fatal to the second, by showing that "the same form is not there preserved. The first, as we have it, shows [*125 a jurisdiction under which it would be competent to indict for perjury: but the second is in that respect utterly bare, and, neither by reference nor otherwise, shows the character of the parties taking the examination.

COLERIDGE, J. I agree with the rest of the court, after much hesitation and regret. We must treat the documents set out in the case as identical in their contents with the originals: the objection is taken on the assumption of that identity. Mr. *Beadon* urges that the examinations must be construed as strictly an order. To that proposition I should not assent without some qualification. As to them, the magistrates are to make up their minds upon the effect of what the witnesses say: if their expressions convey to them a clear meaning, and that is sufficient for the purpose required, we cannot interfere with their construction, unless submitted to us, although we ourselves should not have so understood them. But, as to orders of magistrates, we must take upon ourselves to examine what is the strictly legal effect of the language used. The principle, however, is applicable, as stated, to all that the examinations must show in order that jurisdiction should appear. Now they must show, on their faces, whether they are taken before a proper jurisdiction. Can we then infer, from the circumstance that the two examinations were written on the same paper, that they were taken before the same authorities? In this particular case a hardship seems to be produced by allowing the objection; and this will always be when the case approaches the dividing line. But I am compelled [*126 to ask, as my brother *PATTERSON* does, where are we to stop? Shall we examine handwriting, for the purpose of identifying the persons who take the examinations? Or shall we admit parol evidence? We had better adhere to the general rule: and nothing is easier than for magistrates to draw these documents in the regular form, and so avoid all questions.

Order of Sessions confirmed.

The QUEEN v. DENIS JOHN BLAKE and JOHN CHAMBERLAIN
TYE. *May 30.*

A count for conspiracy charged that T. and B. conspired to cause certain goods which had been and were imported and brought into the port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to the queen, to be carried away from the port and delivered to the owners without payment of a great part of the duties, with intent thereby to defraud the queen; not further describing the goods or the means of effecting the objects of the conspiracy. *Held* sufficient, on motion in arrest of judgment.

T. did not appear; B. pleaded Not guilty. On his trial it was proved that T. was agent to the importer of the goods, B. a landing waiter at the custom house; that it was T.'s duty, (under stat. 3 & 4 W. 4, c. 52, s. 24,) to make an entry describing the quantity, &c., of the goods; that a copy of such entry was delivered to B., who was to compare this copy with the goods, and, if they corresponded, to write "correct" on T.'s entry; whereupon T. would receive the goods on payment of the duty according to his entry. It was further proved that T.'s entry was marked "correct" by B., and corresponded with B.'s copy; that payment was made according to the quantity there described, and that the goods were delivered to T. Evidence was then offered of an entry by T., in his day book, of the charge made by him on the importer, showing that T. charged as for duty paid on a larger quantity than appeared by the entry and copy before mentioned. *Held* admissible evidence against B.

It was proved that B. received the proceeds of a check drawn by T. after the goods were passed. The counterfoil of this check was offered in evidence, on which an account was written by T., showing, as was suggested, that the check was drawn for half the aggregate proceeds of several transactions, one of which corresponded in amount with the difference between the duty paid and the duty really due on the above goods. *Held*, not evidence against B.

INFORMATION by the attorney-general for a misdemeanor.

The first count charged that the defendants, wickedly, &c., intending to cheat and defraud the queen, heretofore, to wit on, &c., at, &c., "did unlawfully and fraudulently conspire, combine, confederate and agree together, and with divers other persons," &c., "to *cause and procure cer-
tain goods, wares, and merchandises, which had been and were [127
theretofore imported and brought into the port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to our said lady the queen, to be taken and carried away from the said port, and to be delivered to the respective owners thereof without payment to our said lady the queen of a great part of the duties of customs so then and there due and payable thereon as aforesaid; with intent thereby then and there to defraud our said lady the queen in her said revenue of the customs. In contempt," &c.

The second count charged the defendants with conspiring, "by false and fraudulent representations and statements of and concerning the numbers, measures, weights and values, respectively, of certain foreign goods, wares and merchandises, which had been and were theretofore imported and brought into the said port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to our said lady the queen, according to the numbers, measures, weights, and values, respectively, of the said foreign goods, wares, and merchandises respectively, to deprive and defraud our said lady the queen of a

great part of the said duties of customs so due as aforesaid. In contempt," &c.

The third count charged the defendants with having conspired, "by fraudulently and unlawfully omitting and neglecting to make and give a true, full and correct declaration and description of the particulars of the numbers, measures, weights and values, respectively, of certain foreign goods, wares and merchandises, respectively, which had been and were theretofore imported *and brought into the said port of London from parts beyond the seas, and in respect whereof certain duties of cus- [*128] toms were then and there due and payable to our said lady the queen according to the numbers, measures, weights and values, respectively, of the said foreign goods," &c., "respectively, to deprive and defraud our said lady the queen of a great part of the said duties of customs so due as aforesaid. In contempt," &c.

The fourth count described the conspiracy to be "to cheat and defraud our said lady the queen of divers large sums of money then being due and payable to our said lady the queen in respect of the duties of customs of this realm. In contempt," &c.

Tye did not appear: Blake pleaded Not guilty.

On the trial, before Lord DENMAN, C. J., at the London sittings after Michaelmas term, 1843, it appeared that Tye was a custom house agent, and Blake a landing waiter. Evidence was given of the practice in the custom house on sight entries, made under stat. 3 & 4 W. 4, c. 52.(a) It appeared that the importer, or his agent, *on making the declaration necessary for a sight entry, and giving a description of the goods, sufficient for their identification, receives an order for their being landed; that afterwards the importer, or his agent, makes out what is called the perfect entry, which should contain the particulars of the goods necessary to determine the amount of duty. The perfect entry is left at the custom house; and the particulars are there copied into what is called a blue book, which is then delivered from the custom house to the landing waiter who is to examine the goods. The landing waiter examines the goods in the presence of the importer or his agent; and, if he finds that the

(a) "For the general regulations of the customs." Sect. 24 enacts "That if the importer of any goods, or his agent after full conference with him, shall declare before the collector or controller that he cannot for want of full information make a full or perfect entry of such goods, and shall make and subscribe a declaration to the truth thereof, it shall be lawful for the collector and controller to receive an entry by bill of sight for the packages or parcels of such goods by the best description which can be given, and to grant a warrant thereupon, in order that the same may be provisionally landed, and may be seen and examined by such importer, in presence of the proper officers; and within three days after any goods shall have been so landed, the importer shall make a full or perfect entry thereof, and shall either pay down all duties which shall be due and payable upon such goods, or shall duly warehouse the same, according to the purport of the full or perfect entry or entries so made for such goods, or for the several parts or sorts thereof: provided always, that if when full or perfect entry be at any time made for any goods provisionally landed as aforesaid by bill of sight, such entry shall not be made in manner hereinbefore required for the due landing of goods, such goods shall be deemed to be goods landed without due entry thereof, and shall be subject to the like forfeiture accordingly."

particulars correspond with those in the blue book, he writes the word "correct," with his initials, across the perfect entry; and the goods are afterwards delivered to the importer upon payment of the duties so ascertained.

It was shown that some goods were imported, and that Tye acted as agent for the importer and obtained a sight entry: Blake acted as landing waiter. The goods were passed to Tye, the duty having been paid on the perfect entry made out by Tye, which was produced in evidence, and shown to correspond with the entry in the blue book, also produced. It was then proposed, on the part of the prosecution, to put in Tye's day book, and to show, by Tye's own entry therein, that the quantity of the goods was much larger than appeared by the perfect entry and blue book, and that the importer had been charged the duties by Tye on such *larger amount, *130] and had paid them to him accordingly. For the defendant, it was objected that the entry in Tye's book was not evidence against Blake. The lord chief justice, however, received it.

Evidence was also given to show that a check drawn by Tye for a certain sum, and dated after the goods were passed, had been cashed, and the proceeds traced to Blake.(a) It was then proposed, on the part of the prosecution, to put in evidence the counterfoil or butt of this check, in Tye's check book, on which was written an account, showing, as was contended, that the check was drawn for a sum amounting to half the profit arising from transactions including the alleged fraud on the revenue, as manifested by the amounts of the several items in that account. To this evidence also an objection was taken, similar to that before mentioned. The lord chief justice received the evidence.

Other evidence was also given, as to the contents of the parcels landed.(b)
Verdict: Guilty.

In Hilary term, (January 25th,) 1844,

Cockburn moved for a new trial on the above objections, and also in arrest of judgment. The information is bad, because it has not the certainty requisite according to the rule laid down by DE GREY, C. J., in *Rex v.*

Horne, 2 Cowp. 672, 682.(c) "The charge must contain such *a *131] description of the crime, that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of 'Guilty' or 'Not guilty' upon the premises delivered to them; and that the court may see such a definite crime, that they may apply the punishment which the law prescribes. This I take to be what is meant by the different degrees of certainty mentioned in the books." To which it must be added that the indictment ought to be such as to enable the defendant to use the proceeding in support of a plea of

(a) The defendant's counsel denied that this tracing had been distinctly made out; but he also argued that, assuming it to be made out, the objection to the evidence was not removed.

(b) Evidence was in fact given of several transactions: but, as both the objections to the evidence applied to one of them, it is thought sufficient to confine the report to that.

(c) See *Regina v. Rowed*, 3 Q. B. 180; *Regina v. Kenrick*, 5 Q. B. 49.

autrefois convict or autrefois acquit. Here no description of the goods is given, except that duties were payable upon the importation of them. Some articles may be imported without any duty; this is therefore an attempt to describe goods by drawing an inference of law. The court ought to judge whether the goods are so liable, and, for that purpose, ought to have brought before it the nature of the goods. In *Rex v. Everett*, 8 B. & C. 114, the defendant was charged with unlawfully soliciting a custom house officer to violate his duty by forbearing to detain goods and merchandises. The goods were described sufficiently as "spirituous liquors:" but judgment was arrested, because the only description of the officer was that he was "employed in the service of the customs," and that it was his duty, as such "person so employed," to arrest and detain all such goods, &c. Lord TENTERDEN said: "The allegation that it was his duty to seize goods which upon importation were forfeited, is an allegation of matter of law. That being so, the fact from which that duty arose ought to have *been stated in the count. If, indeed, it could be said to be the duty of [*132 every person employed in the service of the customs to seize such goods, then the allegation would have been sufficient. But it clearly is not the duty of every such person; as, for instance, it is not the duty of a porter employed in the service of the customs to seize such goods." And he referred to *Max v. Roberts*, 12 East, 89, as in point. It would not be sufficient to charge an officer with extorting illegal fees, or a party with obtaining goods by false pretences, without further description. [PATTESON, J., referred to *Rex v. —*, 1 Chitt. Rep. 698; and Lord DENMAN, C. J., to *Regina v. Peck*, 9 A. & E. 686.] *Rex v. —*, 1 Chitt. Rep. 698, was an indictment for conspiring to defraud J. W. of "divers goods:" now a conspiracy to defraud a party of any goods would be a misdemeanor, not so a conspiracy to pass any goods through the custom house. [PATTESON, J. The fourth count here is for conspiring to defraud the queen of moneys due in respect of the customs.] That is not shown to be an offence unless these were goods liable to the customs.(a)

Lord DENMAN, C. J. I do not feel the smallest doubt that this indictment is good. The charge is for conspiracy to procure imported goods, in respect of which duties were payable, to be delivered to the owners without payment. That is the substance of the first count: the fourth count is in effect the same, and may perhaps be liable to the same objection. I cannot think it necessary to specify the goods. It was matter of evidence, what the goods were to which *the conspiracy related. The parties might have conspired without knowing what they were: they might [*133 have laid their heads together to cheat the queen of whatever customable goods they could pass. The case is not like that cited, of soliciting a custom house officer to neglect his duty. There it was necessary to show

(a) Some authorities, cited in moving, are not mentioned above, but are sufficiently noticed in the argument on showing cause.

that the party solicited was such an officer that the duty was incumbent on him.

PATTESON, J. The first count shows the offence which is charged as clearly as can be done in a case of this kind. As to a future plea of *auterfois* convict or *auterfois* acquit, the identity of the offence must be matter of evidence in ninety-nine instances out of a hundred, in the case of charges of conspiracy. We know that a general count for a conspiracy to bring the House of Commons into contempt would be good, though the means were not set forth: and, in such a case, the identity of the offence, if the party were indicted again, must be made matter of evidence.

WIGHTMAN, J.(a) I am of the same opinion. In *Reg. v. Gill*, 2 B. & Ald. 204, the defendants were charged with conspiring by divers false pretences and subtle means and devices to obtain from A. and B. divers large sums of money, and to cheat and defraud them thereof: and it was held that, the gist of the offence being the conspiracy, it was sufficient only to state the act and its object, and not necessary to set out the specific means. Mr. *Cockburn's* objection would apply to almost every case of *134] conspiracy to defraud a party of goods. It is true that there *might arise some difficulty, on a plea of *auterfois* acquit or *auterfois* convict, from the want of particularity in the indictment. That, in most cases, must be supplied by parol evidence: it is very seldom that enough appears on the face of an indictment to enable a defendant to dispense with such proof.

Rule for arresting judgment refused.

On the other point,

Cur. adv. vult.

The court, in the same term, (January 27th, 1844,) granted a rule nisi for a new trial.

Sir F. *Thesiger*, solicitor-general, and W. F. *Pollock* now showed cause. First, as to the admissibility of the day book. It is true that the declarations and acts of one defendant are not evidence against another until a conspiracy has been proved. But here evidence had been given of a conspiracy between Tye and Blake; for it had been shown that the perfect entry made by Tye corresponded with the entry in the blue book, confirmed, as correct, by Blake. The rest was mere detail: and it then was competent to the prosecutor to show, by the declaration of Tye, that the representation which he and Blake had combined to make was false. On the motion for the rule several authorities were cited. In 1 East's Pl. Cr. 96, it is said that, in cases founded in conspiracy, "the conspiracy or agreement among several to act in concert together for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner. And this must, generally speaking, *135] be done by evidence of the party's own acts, and cannot be collected from the acts of others, independent of his own; as by

(a) Coleridge, J., was absent.

express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts. But it may also be done by evidence of acts of the prisoner, and of any other with whom he is attempted to be so connected, concurring together at the same time and to the same purpose or particular object." In 2 Russell on Crimes, 697, 3d edit., the rule, adopted from 1 Phil. Ev. 199, 9th edit., is laid down as follows. "An able writer upon the law of evidence lays down the following doctrine with respect to the acts or words of one conspirator being evidence against the others. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law the act of the whole party, and, therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted *as evidence to affect them on their trial for the same offence. And, in general, proof of concert and connection must be given, before [*136 evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. It is for the court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, at the time of doing such an act, is evidence against the others." The other authorities referred to in this passage are Starkie on Evidence, (a) 1 Phill. Ev. 477; *The Queen's Case*, 2 Brod. & B. 302; *Rex v. Stone*, 6 T. R. 527, and *Rex v. Watson*, 2 Stark. N. P. C. 116, 141; to which may be added *Rex v. Salter*, 5 Esp. 125, and *Rex v. Hardy*, 24 How. St. Tr. 199. (b) The result of the authorities seems to be that, where the conspiracy charged is of a very general nature, (as, for instance, to excite disaffection, or to convey treasonable information,) concert in the purpose must be established by evidence before the act or declaration of one party can be admissible as against the other. Still, in order to establish the fact of that concert, the separate acts of the individuals may be proved for the purpose of showing the existence of a common object. This is the view taken by COLERIDGE, J., in *Regina v. Murphy*, 8 C. & P. 297, 310. And here the entry in the book was not a mere declaration: it accompanied the act of receiving from the importer.

(a) See Vol. II., p. 325, &c., (3d. ed.)

(b) See pp. 436, 447, 454.

*137] *Next, as to the counterfoil. The account was shown to be connected with Tye's check; and the check produced money which Blake received. Then the question was, whether the money was so given and received in respect of the imputed fraud: if it was, the payment and receipt were parts of the transaction itself. Now this was properly proved by the entry on the counterfoil, which is not a mere statement, but a calculation performed with a view to, and either accompanied or immediately followed by, the drawing of the check, which was a step in carrying the conspiracy into effect.

Cockburn, (with whom were *Humfrey* and *Warren*,) contra, was stopped by the court.

LORD DENMAN, C. J. I have no doubt as to the first point. The evidence clearly was receivable. The day book was evidence of something done in the course of the transaction, and was properly laid before the jury as a step in the proof of the conspiracy.

As to the counterfoil, I felt much doubt at the time of the trial. The admission of the evidence was, however, pressed for on the part of the prosecution; and I thought that it, perhaps, proved an act necessary to be done, as Mr. *Pollock* puts it, to carry the conspiracy into effect. But, on consideration, I think that is not so. The conspiracy was fully effected before that was done. The evidence, therefore, is on the same footing as evidence that Tye told some other party that he had paid Blake money on account of the fraud. It resembles the letter of Thelwall which was rejected

*138] in *Rex v. Hardy*, 24 How. St. Tr. 447. *Of what is it a statement? If we received every statement of a party shown to be a conspirator, we should often find ourselves embarrassed by a party relying upon a statement of his own, to exonerate himself. In *Rex v. Watson*, 2 Stark. N. P. C. 140, papers found at the lodgings of one of the conspirators, not on trial, were admitted against another conspirator, though not found till after the apprehension of the latter, nor directly proved to have been there before his apprehension. That seems to have been done upon the assumption that the other evidence showed that the lodgings had not been entered in the interval, and because the matter in the papers was closely connected with the alleged conspiracy. The language reported to have been there used by the court is, perhaps, too general, if read without reference to the particular facts. Those facts took the case out of the rule in *Rex v. Hardy*, 24 How. St. Tr. 865, &c. But the court thought that an endorsement, which did not appear to be connected with the general design, was not evidence. The case, therefore, is rather an authority against the admission of this evidence. The evidence then must be rejected, on the principle that a mere statement, made by one conspirator to a third party, or any act of such conspirator not done in pursuance of the conspiracy, is not evidence for or against another conspirator.

PATTESON, J. I entirely agree on both points. As to the first, it is laid down that you must establish the fact of a conspiracy before you can make

the act of one the act of all. But you are not bound to bring the parties into each other's presence; the concert may be shown *by either direct or indirect evidence. The day book here was evidence of [*139 what was done towards the very acting in concert which was to be proved. It was receivable as a step in the proof of the conspiracy.

As to the counterfoil, it seems to me to have nothing to do with the conspiracy. What is the charge? A conspiracy to defraud the customs. That appears to have been done before the check was drawn; the check had nothing to do with carrying the conspiracy into effect. The principle in *Rez v. Watson*, 2 Stark. N. P. C. 140, is quite in analogy with this decision: and the same distinction was taken in *Regina v. Murphy*, 8 C. & P. 305, where my brother COLERIDGE rejected evidence of what was said after the transaction. Here the evidence offered is of a statement made after the conspiracy was effected.

WILLIAMS, J. I am of the same opinion on both points. As to the day book, I agree that it is not necessary that the charge of conspiracy should be made out *per saltum*: this cannot be requisite, unless we are prepared to say that nothing can prove a conspiracy except hearing the parties talk together. If this be not necessary, it follows that the existence of a conspiracy may be shown by the detached acts of the individual conspirators. Therefore, the entry made by Tye in his day book was admissible, in order to show one act done with the common purpose.

The writing on the counterfoil is, in effect, a declaration by Tye for what purpose he had drawn the check, and how the money was to be applied. To what did this relate? To a conspiracy at that time *completed. [*140 In *Rez v. Watson*, 2 Stark. N. P. C. 140, the only doubt was, whether the interval of time was not so great as to have allowed another party to place the document where it was found.

COLERIDGE, J. I agree with the rest of the court on both points. As to the first, we have, indeed, not heard Mr. Cockburn; but I feel a very strong persuasion that he would not have convinced me that the day book was inadmissible.

As to the counterfoil, it is quite clear that no declaration of Tye can be received in evidence against Blake which was made in Blake's absence, and did not relate to the furtherance of the common object. What then was this statement? It was made by Tye after the common object was effected; and it is suggested merely to have related to the division of the plunder. It is a memorandum, not merely of the check drawn, but of a large account containing several items, made out for Tye's own use. How can that be connected with the conspiracy? It is suggested that Blake's receipt of the money connects him with the entry. That may make it more credible that the connection existed; but it still does not bring the case within the rule which makes the declaration of one conspirator evidence against another.

Rule absolute for a new trial.

*141] *The QUEEN v. Lord HASTINGS and GAY, Esquire. June 3.

On application to two justices under stat. 2 & 3 Vict. c. 85, s. 1, by guardians of a union, for an order of maintenance, an objection was successfully taken to the evidence offered to prove that the notice of application was signed by a majority of the guardians; no other evidence was given; and the justices thereupon refused to make an order. *Held*, that the justices were not bound to award costs, under stat. 4 & 5 W. 4, c. 76, s. 73, for that there had been no "hearing" of the application.

GUNNING, in last Easter term, obtained a rule, on behalf of John Shepherd, calling upon two justices for Norfolk to show cause why a mandamus should not issue, commanding them to make an order upon the guardians of the poor of the Aylsham Union, in the said county, "to pay to the said John Shepherd the full costs and charges incurred by him in resisting an application made by the guardians of the poor of the said union to the said justices, at a petty sessions held before them, at," &c., "for an order upon the said John Shepherd to reimburse the said union for the maintenance and support of a female bastard child of," &c.; "upon the hearing of which said application the said justices, at the said petty sessions, did not think fit to make any order thereon, but then and there refused to make any order thereon, and dismissed the same."

The rule was granted on an affidavit of Shepherd, which stated that he was served with a notice purporting to be signed by the chairman and sixteen other guardians of the union, which notice was annexed to the affidavit, and stated the intention of the guardians to apply to the justices for an order of maintenance against Shepherd. That Shepherd attended with his attorney and witnesses before the two justices named in the rule, produced the order, and admitted the service. That "thereupon, and after such admission, the said justices called upon *the parties appearing at *142] the said petty sessions in support of the said application to prove that the same was signed by a majority of the guardians(a) who by law ought to have signed the same; but they were unable to give such proof, and the same was not proved." "That thereupon, and upon the hearing of the said application as aforesaid, the said justices, so assembled at the petty session as aforesaid," &c., "then and there did not think fit to make any order thereon, but then and there refused to make any order thereon, and dismissed the said application." That Shepherd's attorney then applied for an order for costs, which the justices refused to make. There was also a statement as to the expenses incurred.

In answer, the clerk to the justices deposed "that there was no hearing of the application" otherwise than was mentioned in the minutes of the proceedings, a copy of which was verified by him and annexed to his affidavit. From these it appeared that Shepherd's attorney, Mr. Rackham, admitted the service of the notice. The minutes contained the entries following:

(a) See *Regina v. The Justices of Cambridgeshire*, 7 A. & E. 480.

"The prosecutors are called on to prove that the notice is signed by a majority of the guardians of the Aylsham Union, present on the 19th of March last, when the order was signed. They tender Mr. John Rump, the guardian of the parish of Flindolvestone, to prove this. Mr. Rackham objects, Mr. Rump being one of the prosecutors. On looking to the notice, it appears that Mr. John Rump is one of the guardians who signed the notice." "Case dismissed; Mr. Rump being one of the guardians who signed the notice, and therefore *one of the prosecutors, and, with his exception, there being no one to prove that the notice is signed [*143 by a majority of the guardians present at the Aylsham Union on the 19th March, 1844, when this prosecution was ordered. No costs, as the case is stopped by a preliminary objection."

Erle now showed cause. Sect. 73 of stat. 4 & 5 W. 4, c. 76, enacts that no application for an order "shall be heard" at sessions unless fourteen days' notice shall have been given "under the hands of such overseers or guardians," &c., and then provides that, "if upon the hearing of such application the court shall not think fit to make any order thereon, it shall order and direct that the full costs and charges incurred by the person so intended to be charged in resisting such application shall be paid by such overseers or guardians." Here the two justices, (acting, under stat. 2 & 3 Vict. c. 85, s. 1, (a) with the authority given to the Quarter Sessions by stat. 4 & 5 W. 4, c. 76, ss. 72, 73,) have not heard: they have acted on the early part of sect. 73 of stat. 4 & 5 W. 4, c. 76, which prohibits the hearing in default of due notice. The applicant, in fact, after successfully objecting to the case being heard, demands that the magistrates shall act as if it had been heard. *Regina v. The Recorder of Exeter*, 5 Q. B. 342, will be cited on the other side. There this court held that costs ought to be given where an application for an order of maintenance was dismissed because the applicants appeared, on the hearing, not to be proper parties to apply: but the case was not, as here, stopped on *a preliminary [*144 objection: the merits as between the parties before the sessions, were discussed and decided upon.

Gunning, contra. *Regina v. The Recorder of Exeter*, 5 Q. B. 342, shows that this was a hearing: the evidence was received to prove one essential step in the case; and it fell short of proof. Under stat. 8 & 9 W. 3, c. 30, s. 3, costs may be given by Quarter Sessions in quashing an order of removal for mere informality; *Rez v. Cottingham*, 2 A. & E. 250. In *Regina v. Stamper*, 1 Q. B. 119, parties applying for an order of maintenance had duly entered an application; but, when the case was called on, they did not appear, though the party against whom they applied did: and, no order being made, the sessions gave costs: and this court upheld their proceeding. The legislature cannot have intended that a party should lose his costs if he insists on a preliminary objection.

Lord DENMAN, C. J. I think this party is not entitled to costs. He has

(a) See now stat. 7 & 8 Vict. c. 101, ss. 1, 2, 3, 4.

prevented the hearing, by insisting on the want of notice: and the case therefore does not fall within stat. 4 & 5 W. 4, c. 76, s. 73.

PATTESON, J. This case turns entirely on stat. 4 & 5 W. 4, c. 76, s. 73. The sessions cannot hear unless there has been due notice. Accordingly, the present applicant insists on the want of notice, and thereby prevents a hearing; after which he says that there has been a hearing. *Regina v. Stamper*, 1 Q. B. 119, was not decided on *the point of notice: *145] nor was *Regina v. The Recorder of Exeter*, 5 Q. B. 342, where an order was asked for by parties not entitled to apply.

WILLIAMS, J. On the grounds already taken, I think the authorities cited do not warrant the giving of costs here. It is too much, first to say that the justices shall not hear, and then to insist that they are wrong in assuming that they have not heard.

WIGHTMAN, J. I am of the same opinion, taking into consideration the language of sect. 73, and the conduct of Mr. *Gunning's* client. He objects successfully to the hearing, for want of proof of notice; and then he requires that the case shall be considered to have been heard.

Rule discharged.

DANIEL v. GRACIE. June 3.

The proprietor of a house and of a marl pit and brick mine demised the house, by unwritten agreement, to D. from a day named; and it was at the same time agreed between them, without writing, that D. should take the marl pit and the brick mine, and should pay quarterly, at the usual quarter days, 8*d.* per solid yard for all the marl that he got, and 1*s.* 8*d.* per thousand for all the bricks that he made. D. took the marl and made bricks accordingly, and paid the stipulated sums for a time; but they afterwards fell into arrear.

Held, that the agreement for the marl pit and brick mine was a demise of the land from year to year, at a rent capable of being ascertained with certainty, and for which, therefore, the lessor might distrain.

REPLEVIN. First count for goods taken in a dwelling house in the parish of Burslem, Staffordshire. Second count for goods taken in a certain close in the same parish, described by abuttals.

Cognisance. As to the first count, for rent due in respect of the dwelling house.

*As to the second count, (except as to the taking of certain of *146] the goods therein mentioned,) that plaintiff held and enjoyed a certain marl and slack pit, in and parcel of the close in which, &c., as tenant thereof to Richard Edward Creswell, under a demise thereof theretofore made at a certain rent, viz. 8*d.* for every cubic yard of marl and slack dug and gotten by plaintiff from and out of the said pit, payable quarterly, to wit on, &c., (the usual quarter days;) and, because a large sum, &c., to wit, 16*l.* 16*s.* 11*d.*, of the rent last aforesaid, for and in respect of divers, to wit, five hundred and six, cubic square yards of marl and slack dug and gotten by plaintiff from and out of the said pit during the quarter of a year ending 25th December, 1841, and part of another quarter, to wit, the

quarter then next preceding, became and was on the day and year last aforesaid due, &c., defendant, as bailiff to R. E. C., well acknowledges the taking of the said goods, &c., the same then being in and upon the said marl and slack pit so being parcel of the said close in which, &c., and justly, &c.: verification. And, as to the residue of the second count, that plaintiff held and enjoyed a certain brick mine, in and parcel of the close in which, &c., as tenant to R. E. C. under a demise thereof theretofore made at a certain rent, viz. the sum of 1s. for every one thousand bricks made and burnt by plaintiff from the said mine, payable quarterly, to wit, &c., (the usual quarter days;) and, because a large sum, &c., to wit, 13s. 4d., of the rent last aforesaid, for and in respect of divers, to wit, 8000, bricks made and burnt by plaintiff from the said mine during the quarter of a year ending on 29th September, 1841, became and was on the day and year last aforesaid due, &c., defendant, as bailiff of R. E. C., well acknowledges the taking of 'the residue of the goods, &c., in and upon the said brick mine in and parcel of the said close, &c., and justly, &c. [*147 Verification.

The only pleas in bar which it is material to state were: 3. As to the cognisance pleaded to the last count, except as to the taking of the goods in that cognisance excepted, that plaintiff did not hold or enjoy the said marl and slack pit, in and parcel, &c., as tenant thereof to R. E. C. under the said supposed demise, &c., in manner and form, &c.: conclusion to the country. Issue thereon. 5. To the cognisance pleaded to the residue of the last count, that plaintiff did not hold or enjoy the said brick mine, in and parcel, &c., (as in the third plea:) conclusion to the country. Issue thereon.

On the trial, before WILLIAMS, J., at the Staffordshire summer assizes, 1843, it appeared that in September, 1840, the plaintiff was occupying a house of which Mr. Creswell was proprietor, and a conversation took place between the plaintiff and Green, Creswell's agent, respecting the future terms of plaintiff's tenancy. Green, (who was the principal witness for the defendant,) stated that he, on that occasion, agreed, in consequence of some repairs done by plaintiff, that plaintiff should have the house rent free till the ensuing 12th of November, from which time he was to hold it at a certain rent. There was a marl and slack pit, then open, near the house: and it was agreed, (a) in the same conversation, that plaintiff (who was a potter, dealer in marl, and brickmaker) should take the marl pit, and should pay 8d. per solid yard for all the marl that he got. It was to be paid quarterly, at the four usual quarter days. It was also agreed at 'the same time that plaintiff should take a brick mine, then in work, belonging to Mr. Creswell, at Burslem, and should pay 1s. 8d. per thousand for all bricks made; the payments to take place quarterly. No written agreement was proved. The plaintiff had made payments for the marl pit and brick mine before the arrear in question accrued. It was

(a) The witness did not profess to state any precise terms of the agreement.

objected, for the plaintiff, that on this evidence there did not appear, as to the marl pit and brick mine, any demise under which a distress for rent could be made; and that the agreement for the pit and mine had not the certainty requisite in a lease, as to the subject matter or the time when the enjoyment was to commence, and was, in fact, a mere license. The learned judge gave leave to move to enter a verdict for the plaintiff on the third and fifth issues: and a verdict was taken for the defendant on all.

In Michaelmas term, 1843, *E. Yardley* moved for a rule to show cause why a verdict should not be entered for the plaintiff on the third and fifth issues, or a new trial had. He cited *Doe dem. Hanley v. Wood*, 2 B. & Ald. 724; and contended that the agreement as to the pit and mine conveyed merely one of those uncertain interests in land which have been held to require a written contract under stat. 29 Car. 2, c. 3, s. 4. A rule nisi was granted. In last Easter vacation, (a)

Whateley and *Greaves* showed cause. This case is distinguishable from *Doe dem. Hanley v. Wood*, (a) where nothing was granted but a permission to enter upon land and take minerals there found; here it may *be
 *149] collected from the evidence that the plaintiff was to have the soil itself; the house, the marl pit and the brick mine were all taken together, as the subject of one contract. Words "whether they run in the form of a license, covenant, or agreement," are sufficient to constitute a lease, if they show "the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time;" 4 Bac. Abr. 816, (7th ed.,) *Leases, &c.*, (K.) And the plaintiff here has adopted the agreement as a demise by paying rent. The terms of the holding are indeed so far uncertain that the rent cannot be ascertained without a measurement: but a periodical measurement to ascertain the rent is common in the mining districts; and *certum est quod certum reddi potest*. The stipulations here are like the ordinary one, that if a tenant converts pasture land into arable he shall pay rent at such a rate. [Lord DENMAN, C. J. There the lease generally gives an express power to distrain.] That is only for greater caution. The agreement in this case is good as a lease from year to year within stat. 29 Car. 2, c. 3, s. 1: no question arises on sect. 4, because this is a cognisance for rent, not an "action" brought "to charge any person" "upon any contract or sale of lands," "nor any interest in or concerning them." "The statute," Lord ELLENBOROUGH says, in *Crosby v. Wadsworth*, 6 East, 601, 611, "does not expressly and immediately vacate such contracts," (under sect. 4.) "if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party or his representatives, on the ground of such contract, and of some supposed breach thereof:" *and the contract, in that case, was held
 *150] not binding only on the ground of its having been discharged while it was executory. Here it is executed; and the defendant relies on sect. 1. BAYLEY, B., says, in *Edge v. Strafford*, 1 Cro. & J. 391, 397, S. C. (a) May 10th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Ja.

1 Tyr. 295, 301: "The effect then of the Statute of Frauds, as far as it applies to parol leases not exceeding three years from the making, is this, that the leases are valid, and that whatever remedy can be had upon them, in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession."

E. Yardley, contra. No demise was proved. [PATTESON, J. As to the point on the Statute of Frauds, I see nothing in it. Why was this not a tenancy from year to year?] The evidence showed no tenancy, but a license merely. The house is distinct from the other subject matters of the cognisances. It appears that after the house was taken something was said about the pit and brick mine, and it was agreed that the plaintiff should take the marl and clay on certain terms, but not as a tenant, subjecting himself to a distress. The price was recoverable, but not as rent. The decisions on sect. 4 of the Statute of Frauds, do not apply directly to this case; but they point out the distinction between demises and the less certain interests in lands which, for the purposes of that clause, require a written agreement. In the cases, which have been referred to, of farming leases, and in mining leases, it is usual to give the power to distrain by express provision. The objection of uncertainty has not been answered. The rule *certum est, &c.*, applies where, to ascertain the amount, *nothing beyond a mere computation is necessary; but not where a measurement must first [*151 be made of something which is to be taken. It does not appear when the supposed tenancy was to commence, or how long to last. If there was any, it was only a tenancy at will, and no distress could be taken; *Hegan v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 B. & Ald. 322; *Regnart v. Porter*, 7 Bing. 451; *Riseley v. Ryle*, 11 M. & W. 16. [PATTESON, J. If a party says to another, "you shall have such a field, paying so much quarterly," and he enters, is not a tenancy created at that rent?] When the rent, as such, has been paid; not before. As to the certainty of leases in respect of their continuance, it is said in 4 Bac. Abr. 835, *Leases, &c.*, (L.) 3, that "this ought to be ascertained either by the express limitation of the parties at the time of the lease made, or by a reference to some collateral act, which may with equal certainty measure the continuance thereof."

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the court. After stating the material part of the pleadings, his lordship proceeded as follows.

It was in proof that the plaintiff and the agent of the said Creswell agreed that the plaintiff should take a certain marl and slack pit, and pay yearly 8*d.* per yard for all the marl and slack got, at the four usual quarterly days. It was also at the same time agreed that the plaintiff should work a brick mine, and pay 1*s.* 8*d.* per thousand for all bricks made, quarterly at the usual days.

*It appeared that these pits or mines, near to a house of Creswell occupied by the plaintiff, (for the rent of which a distress was put in, but about which there was no question,) were in work before they were [*152

taken by the plaintiff. And the question is, whether in this case rent is reserved for which a distress lies. That *land* was the subject of demise was, we believe, hardly questioned in the argument. Indeed, from the nature of the thing, the work in the mines or pits could not be prosecuted by the plaintiff at all without taking land in proportion to the extent of the operation.

Now, upon the principal question, we find in Co. Litt. 96 a, the following passage. "It is a maxim in law, that no distress can be taken for any services that are not put into certainty, nor *can be reduced to any certainty*; for, *id certum est, quod certum reddi potest*;" "and upon the avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty. And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this uncertainty, being referred to the manor which is certain, the lord may *distrain* for this uncertainty. Et sic de similibus." And again at page 142 a, Lord Coke, in commenting upon the expression "certain rent" in the text of Littleton, observes, "the rent must be certain, or which may be reduced to a certainty; for *id certum*," &c. "And the rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts," &c., "or other profit that lieth in render, office, attendance, and such like, as in payment of money."

*153] "In the present instance, however, the rent is reserved in money; and the amount is, according to the criterion of Lord Coke, capable of being ascertained, "*certum reddi potest*," by the number of cubic yards of marl and slack got in the one case, and of bricks made in the other. And no point was made that the goods, &c. were not taken upon the demised premises.

We are of opinion, therefore, that the verdict found for the defendant upon the issues joined upon the pleas to the above cognisances must stand.

Rule discharged.

The QUEEN v. ROSE. June 5.

In the Highway Act, 5 & 6 W. 4, c. 50, s. 27, which directs the surveyor to rate all property then liable to be rated to the poor, provided that the same rate shall also extend to such woods, mines, &c., *as have heretofore been usually rated* to the highways, the words "*usually rated*" refer, not to legal rateability, but to rating in point of fact, and to the practice of rating in the particular parish, not in the country generally.

On appeal against a surveyor's rate on timber woods, the sessions found for the appellant, subject to a case, which stated that the woods were not liable to poor rate: that, from 1809 down to the passing of stat. 5 & 6 W. 4, c. 50, they had not been rated to the highways: and that timber woods of a like description had always been rated to the highways in the majority of parishes in the country and neighbourhood, but in some they had not been so rated since 1809. *Held*, that the appellant's woods were not shown to be chargeable under sect. 27.

On appeal by Henry Philip Powys, Esq., against a rate made by Thomas Rose, the surveyor of the parish of Whitchurch in the counties of Oxford-

shire and Berkshire, under stat. 5 & 6 W. 4, c. 50, being the highway rate, at 6d. in the pound, for the year 1843, and which was allowed by two justices, &c., the sessions amended the rate by striking out the name of the appellant, and the word and sum "*Woodland, 48l.*," at which he was, in and by the said rate, among other properties, assessed; and by altering the aggregate amount of the annual value of the several properties in respect of which *he was therein rated from 407l. 1s. to 359l. 1s.; and they confirmed the rate in all other respects, subject to the opinion of this [*154 court upon the following case.

The appellant, from the year 1838 up to and at the time of the making of the rate appealed against, was the occupier of certain timber woods within the said parish of Whitchurch, the same not being saleable underwood within the intent and meaning of the act of 43 Eliz. c. 2, s. 1, but being property which, at the time of the passing of the act 5 & 6 W. 4, c. 50, and also at the time of the making of the said rate, was not liable to be rated and assessed to the relief of the poor. From the year 1809 down to and including the year in which stat. 5 & 6 W. 4, c. 50, was passed, the said timber woods had not been rated to the highways of the said parish. Since the passing of that statute, the appellant, as surveyor of the highways, under the last mentioned statute, for the year 1840, rated himself in respect of the said timber woods, and paid such rate. Timber woods of a similar description to those occupied by the appellant have always been rated to the repairs of the highways in the majority of the parishes in the country and neighbourhood; but in some they have not been so rated since the year 1809. It was admitted that, if the appellant was rateable in respect of the woods in question, the amount of the rate was fair: and the only question between the appellant and respondent was, whether the appellant was rateable in respect of such timber woods. If the court should be of opinion that the appellant was so rateable, the order of sessions was to be quashed; if of the contrary opinion, to be confirmed.

* *Walesby* in support of the order of Sessions. The point arises on stat. 5 & 6 W. 4, c. 50, s. 27, which, "in order to raise money [*155 for carrying the several purposes of this act into execution," enacts, "That a rate shall be made, assessed, and levied by the surveyor upon all property now liable to be rated and assessed to the relief of the poor; provided that the same rate shall also extend to such woods, mines, and quarries of stone, or other hereditaments, as have heretofore been usually rated to the highways;" and the question is, whether the hereditaments spoken of in the proviso are such as have been usually rated throughout the whole kingdom or only in the parish for which the rate is made. (*The court* here said that it would be most convenient to hear the other side first.)

Keating and *Phinn* for the respondents. The proviso relates to hereditaments which, before the statute, have been legally rated throughout the kingdom; and all woods were rateable for the highways, (as appears by stat. 13 G. 3, c. 78, s. 34, stat. 34 G. 3, c. 74, s. 4, and other enactments as to

statute duty,) though all were not rateable to the poor. The legislature cannot have meant the liability to depend on the practice in a particular parish. Sect. 33 of stat. 5 & 6 W. 4, c. 50 does give a specific exemption, in the case where "property, or the owner or occupier in respect thereof, has, previous to the passing of this act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate:" but under that clause, if it were alleged that property had not been usually rated in the particular parish, the court could not enter into such a question. It may be *argued that the *156] surveyor of a parish could not ascertain what had been usually rated in other parts of the kingdom; but the court must look to the words of the statute, not to a suggested inconvenience. [PATTESON, J. The clause seems to imply that some of the hereditaments were not usually rated.] All woods were legally rateable; the expression "usually" may refer to an exception in cases where there have been compositions. The construction argued for on the other side would release parties who have hitherto contributed by statute labour. The appellant is seeking a special exemption; he ought to point out words which expressly give it. [COLERIDGE, J. If all wood was in point of law rateable to the highways before the statute, the words "heretofore" "usually rated" can refer only to the question of fact, what has been rated or omitted in the rates.] Still the question of fact relates to the general usage throughout the country. [Lord DENMAN, C. J. The case says that woods like the appellant's have been rated "in the majority of the parishes in the country and neighbourhood." I do not know what is meant by the "country" or "neighbourhood."]

Walesby, contrâ. What has been "usually rated," is a question of usage and fact to be determined by the surveyor. The respondent's construction makes "rated" synonymous with "rateable." (He was then stopped by the court.)

Lord DENMAN, C. J. It is impossible to put a satisfactory construction on this clause. The expression "such woods" "as have heretofore been usually rated" implies that particular woods have not heretofore been *so. But it seems that all were by law rateable; therefore, I do not *157] see how we can find any other meaning for the exception than "woods heretofore actually rated in the parish for which the rate is made." The case states that these woods were not rated from the year 1809, till the passing of the statute; and, if so, they are exempt under sect. 27. I do not feel perfectly satisfied with this construction; but the words may fairly bear it.

PATTESON, J. The words "have heretofore been usually rated" must be confined to the particular parish, or I do not know what length the inquiry may go to: but whether the particular woods are meant, or only the kind of wood, I do not say. It is sufficient nere that the woods in question were not rated, nor do any such woods appear to have been rated in the parish, from 1809 till the passing of stat. 5 & 6 W. 4, c. 50.

WILLIAMS, J. We cannot adopt Mr. *Keating's* argument without holding that "rated" means "rateable." The twenty-seventh section must contemplate that which is the usual mode of rating in the particular parish. Then the finding of the sessions decides the case for the appellant.

COLERIDGE, J. In a modern act, and one so full of words as this, the literal construction is the safe one, unless another be clearly shown which we ought to adopt. Under this clause, it would not be difficult for the surveyor to find what had been the usage in the parish; but he would have great difficulty in ascertaining the usage of a "neighbourhood," and deciding upon *the majority or minority of instances in so wide a district. And the comparative difficulty would be the same on the [*158 trial of an appeal.

Order of sessions confirmed.

The *QUEEN v. The Inhabitants of STOKE BLISS.* June 5.

Parish officers, having given notice of appeal against an order of removal, served a countermand, stating that they did so on account of the absence of a witness, but should give fresh notice of appeal. The countermand was too late for the sessions. At the sessions, the respondents entered the appeal and moved for costs. The sessions made an order, whereby, after reciting that service of notice of appeal on the respondents had been proved, and that no one appeared for the appellants to prosecute such appeal, they adjudged that the order of removal should be confirmed, and that the appellants should forthwith pay the respondents 15*l.* for their costs and charges which they had incurred and been put to in attending the sessions that day to support the order.

Held, on motion to quash, that the order of confirmation was bad for want of jurisdiction, and that the order for costs could not be separated from it; and therefore that the whole must be quashed.

Semble, per **PATTON, WILLIAMS, and COLERIDGE, J.**, that an order for costs of the day only would have been good, under stat. 8 & 9 W. 3, c. 30, s. 3.

Two justices made an order for the removal of Ann Wall and her child from the parish of Kingswinford, Staffordshire, to the parish of Stoke Bliss, in Herefordshire. The order, examinations, and notice of chargeability were duly transmitted to Stoke Bliss, and the churchwardens and overseers of that parish gave notice of appeal at the next Staffordshire quarter sessions, with the grounds of such appeal, one of which was a settlement of the paupers in a third parish. The sessions began on Tuesday, January 2, 1844. On January 1st, the attorney for the appellants wrote a letter to the overseers of Kingswinford, stating that the notice of appeal was countermanded by reason of the absence of a material witness, and that the appellants were prepared to receive the paupers, but should give fresh notice of appeal, and were ready to furnish the respondents with any information which might prevent their *removing the paupers and incurring further expense. The letter was received on January 2d, and notice [*159 of countermand received on the same day. By the practice of the Staffordshire sessions, a party giving notice of countermand later than the Monday

before the sessions, is liable to costs. The appellants did not enter their appeal or attend the sessions. The respondents attended and moved for costs, calling a witness who proved service of the notice and grounds of appeal, and the countermand. The sessions made the following order.

"*Stoke Bliss* } Upon the motion of Mr. *Whitmore*, of counsel for the
v. } churchwardens and overseers of the poor of the parish of
Kingswinford. } Kingswinford in the county of Stafford, and upon proof of notice of appeal, with a statement in writing of the grounds of such appeal, signed by the churchwardens and overseers of the poor of the parish of Stoke Bliss, in the county of Hereford, having been given to the said churchwardens," &c., "of Kingswinford fourteen days previous to the sessions now holden, against a certain order under the hands," &c., "for the removal of Ann Wall," &c. ; "and no one appearing on behalf of the appellants to prosecute their appeal: It is ordered, that the said order so made," &c., "be, and the same is hereby, confirmed: And it is further ordered that the said churchwardens," &c., "of Stoke Bliss do and shall forthwith pay to the said churchwardens," &c., "of Kingswinford the sum of 15*l.* 10*s.* for the costs and charges which they have incurred and been put unto in attending the court this day to support the said order. By the court," &c.

The order was removed into this court by certiorari: and, on a former day in this term, *W. H. Cooke* moved *that the order might be
*160] quashed, on affidavits setting forth the material facts, and stating, (on information and belief,) that the appeal was entered, and the fees of entry paid by the respondents.

Whitmore now showed cause. Entering the appeal was a mistake; and the session had no power to confirm the order of removal: but stat. 8 & 9 W. 3, c. 30, s. 3, empowers the justices in sessions to give costs "upon any appeal before them there to be had," "or upon any proof before them there to be made, of notice of any such appeal to have been given by the proper officer to the churchwardens," &c., "of any parish or place, (though they did not afterwards prosecute such appeal.*)" This case is within the latter alternative; the sessions had jurisdiction to grant costs; and their order is divisible. It is, in fact, two orders on a single paper.

W. H. Cooke, contrà. The sessions were misled into giving judgment on the order of removal; and the costs were ancillary to that judgment. *Regina v. The Justices of the West Riding*, (*Sheffield v. Crich*), 5 Q. B. 1, shows that the respondents had no right to proceed upon the appeal itself. A notice of appeal, not followed up, does not preclude the appellants from giving a fresh notice when the pauper is actually removed: "and as the eighty-fourth section of the 4 & 5 W. 4, c. 76, gives the expenses of maintenance to the respondent parish, if successful, from the time of their giving notice of the chargeability, no material injury arises to them from the delay;" *Regina v. The Justices of Middlesex*, 9 Dowl. P. C. 163, 170. [PATTESON, J.

*It is not said there that costs are not to be recovered in the meantime.] Costs incurred in the meantime will be costs in the cause [*161] when the final decision takes place. When the appeal is heard, it may turn out that the proceedings on the part of the respondents were vexatious. [PATTESON, J. Suppose the appellants do not choose to go on.] When the time for appeal has wholly gone by, the respondents may apply for costs under stat. 8 & 9 W. 3, c. 30, s. 3. [PATTESON, J. If no appeal is prosecuted, can they go to a different session from that which was named in the notice of appeal?] The effect of stat. 8 & 9 W. 3, c. 30, s. 3, is that the justices may award costs "at the same quarter sessions" at which the application is made. But, under stat. 4 & 5 W. 4, c. 76, the costs could not be applied for till the appeal is either decided or finally abandoned. The order here is so worded as to include the general costs of the appeal, not merely the costs occasioned by a notice countermanded too late.

LORD DENMAN, C. J. The appellants in this case gave a notice of countermand, stating as their reason the want of a material witness, but intimating to the respondents that they still thought they had ground for resisting the order of removal. The respondents attended the sessions, and obtained an order, confirming the order of removal with costs. It is said that the order of sessions, though not otherwise maintainable, is good to the extent of the judgment for costs; and that the order is divisible. But I think that it is not so. Looking at the document, we must see that the sessions have assumed to confirm the order of removal, and to award costs as ancillary to the judgment of confirmation, *which judgment they [*162] had no right to give. The order must therefore be quashed.

PATTESON, J. It is unfortunate that the sessions have proceeded in this manner. Their order states that, no one appearing to prosecute the appeal, they confirm the order of removal. That they had no jurisdiction to do; and we cannot separate the order for costs from the order of confirmation. Whose the fault was, is not matter for our inquiry. I am far from saying, as at present advised, that, if the order of sessions had been merely for costs of the day, it would not have been good. I do not hold that the new act has, as Mr. Cooke suggests, done away with the provisions of stat. 8 & 9 W. 3, c. 30, s. 3.

WILLIAMS, J. On the last point I agree with my brother PATTESON. If it were not as he states, a party receiving notice of countermand would be remediless in a case like this. But, looking at the document itself, (and it is best to look at documents, and as little as possible at affidavits,) we find that the order of sessions, instead of being made merely to give compensation for the costs between notice of appeal and countermand, is an order expressly confirming the order of removal, with an award of costs.

COLERIDGE, J. The January quarter sessions were the time at which a proper application might have been made; and I do not say that the order of sessions might not have been separable, if the latter part could have stood alone. This is a question of construction; and it is best not to look

*163] at the affidavits. Taking the *intention from the document itself, I think the sessions have assumed, in the first part of it, that they had power to confirm the order of removal; and the latter part is merely ancillary: therefore the whole order must fail. Rule absolute.

The QUEEN v. The Justices of MERIONETHSHIRE. June 6.

On notice of appeal against an order of removal, the removing parish served a *supersedeas*, and tendered 2*l.* for costs of appeal. It was a rule of the sessions to allow no more costs than 30*s.* on such appeals. The appellants refused the 2*l.*, their costs amounting to a larger sum; and at the next sessions they moved to enter the appeal, for the purpose of obtaining full costs. The justices refused to enter it, alleging their rule of practice as a reason.

Held, that the justices ought to have entered the appeal, and exercised their discretion as to costs upon a hearing. *Mandamus* granted, to enter continuances and hear.

A *rule nisi* was obtained, in a former term, for a *mandamus* commanding the justices of Merionethshire to enter continuances and hear the appeal of the inhabitants of the parish of Denio, Carnarvonshire, against an order of justices removing William Williams and his family to Denio from the parish of Llangar, Merionethshire. The following facts appeared on affidavit for and against the rule.

The parish officers of Denio, on January 30th, 1844, gave notice of appeal for the next quarter sessions, and of the grounds of appeal. Llangar obtained a *supersedeas*, which was served on March 29th, the ground stated being that the examination was insufficient. At the time of service, no costs were tendered. A new order of removal was obtained and served: and afterwards, (April 9th,) the officers of Llangar tendered 2*l.* to the officers of Denio as their costs of appeal against the former order. The latter refused this order, on the ground that the costs amounted to a much larger sum, adding that, unless this were paid, they should prosecute

*164] the appeal. The costs in fact amounted to 26*l.* 3*s.* 4*d.* The appellants went, with their witnesses, to the quarter sessions, holden at Dolgelly, April 12th, and moved to enter their appeal. The motion was opposed on the ground of the *supersedeas*: and the justices on that ground refused to permit the appeal to be entered. They also refused to allow the appellants their costs incurred in the prosecution of the appeal. An affidavit in opposition to the rule, (sworn by the attorney who appeared for the respondents at sessions,) stated that the appellants, in making their motion, declared their sole object to be the obtaining payment of their full costs. It further stated as follows: that there is, and has been for a great many years last past, a standing rule or order on the books of the quarter sessions of the peace for the said county of Merioneth, whereby it is ordered that the sum of 30*s.* only, as and for costs and expenses, shall be allowed, on appeals against orders of removal tried in the said court, to either party: and "that it is the general practice of the said court to act upon such rule." The justices, on refusing to allow the appeal to be

entered, said that, by reason of the above mentioned rule and the practice of the court, no injustice had been done, since the appellants had been offered more than the costs which would have been allowed them if the appeal had been tried upon its merits, and the order of removal quashed.

Jervis and *W. Yardley* now showed cause, and, after stating the facts, contended that the justices were not bound to enter this appeal merely for the purpose of giving 30s. costs, but might exercise a discretion. *Rez v. The Justices of Norfolk*, 5 B. & Ald. 484, was cited.

**Welsby*, contra. It is not even alleged here that the respondents tendered reasonable costs. The supposed rule of sessions does not sufficiently appear on the affidavit. A copy of it should have been set out. It is not shown to be universal. It is said to prevail in the case of appeals "tried;" but there may be reason for applying it to those, and not to appeals uncontested. The sessions ought to exercise their discretion upon a hearing of the case, as was done in *Regina v. Townstal*, 3 Q. B. 357, and *Regina v. Stayley*, 3 Q. B. 357. [PATTESON, J. The practice makes the difference in this case. COLERIDGE, J. We do not interfere as to the amount of costs, when it has been decided by the sessions. When I went sessions, costs were not given on the principle of remuneration: it was usual to allow only 40s.] [*165]

Lord DENMAN, C. J. Mr. *Welsby* contends that the affidavits do not properly show the rule of practice: but I think it appears sufficiently by what is said to have occurred at the sessions; and, that being so, the question is, whether the justices acted legally. I am of opinion that they were bound to enter the appeal, and ought then to have exercised a judgment as to the costs. Appellants in such a case ought to recover all the reasonable costs they have incurred.

PATTESON, J. According to the last decision we cannot say that the justices ought not to exercise a discretion as to the costs, though the party calling upon them may gain nothing by the result.

COLERIDGE, J. Perhaps we might not grant this writ *if we were satisfied that the justices would adhere to their practice: but, as the rule is a very unreasonable one, they will probably reconsider it. [*166]

WIGHTMAN, J., concurred.

Rule absolute.

BESSEY and COSTERTON v. WINDHAM, Esquire.

An assignment of goods in fraud of creditors is valid as between parties to the deed and as between either party and a stranger.

A sheriff claiming to seize the goods on behalf of a judgment creditor is a stranger within this rule, if he does not prove the legal authority under which he seized on behalf of such creditor. For this purpose it is sufficient, in trespass for the seizure, if he prove the writ.

And there is some evidence of the writ, if the plaintiff puts in the sheriff's warrant to his officer, and that recites a writ at the suit of the judgment creditor.

The judge, in an action brought against the sheriff as above, left it to the jury to say whether or not the parties to the alleged fraudulent conveyance meant any thing to pass by it; the jury found in the negative; and a verdict was taken for the defendant. The case went to the jury without notice of any proof that the sheriff acted under a writ sued out by the judgment creditor, the effect of the recital in the warrant being overlooked by all parties. A new trial was moved for on the ground that the sheriff, if standing in the situation of a stranger, could not impeach the deed; and the court was of this opinion; but, on showing cause, the effect of the recital in the warrant was pointed out, and admitted by the court.

Held, that a new trial ought not to be granted on the ground merely that the cause had been tried on an assumption that the alleged fraud would be a defence to the sheriff, without taking the jury's opinion on the effect of the recital as showing his right to make such defence.

TRESPASS for taking and converting plaintiffs' wherry, masts, &c. Pleas 1. Not guilty. 2. That the wherry, &c. were not the goods and chattels of plaintiffs, in manner and form, &c. Issues thereon.

On the trial, before Lord DENMAN, C. J., at the Norwich Summer assizes, 1843, the facts appeared to be as follows. On January 2d, 1843, Brinded, a coal-merchant, being indebted to the plaintiffs, executed a deed of assignment by way of security, to which Brinded was party of the first part and plaintiffs of the other part, and by which he bargained, sold and assigned *167] the wherry, &c., to plaintiffs, in trust to sell when they should think proper, and out of the proceeds to pay themselves 50*l.*, part of their debt, and to pay Brinded the surplus.^(a) On January 10th, Costerton went to the stait, near Brinded's house, where the wherry was lying in charge of a man employed by Brinded, and took possession. He ordered Brinded's man to load her with flints to go on a voyage for the plaintiffs: but, in consequence of the boat's rudder being broken, the voyage was not made. Before giving the order, Costerton had said to Brinded: "If I take the wherry under my care, you shall go master of her." The boat remained in the same place, (not being again used by Brinded,) till January 16th, when the defendant, the sheriff of the county, seized her under a *fi. fa.* at the suit of Palmer, a judgment creditor of Brinded. The plaintiffs, to connect the defendant with the act of trespass, put in his warrant under which the seizure was made, and which recited the writ of *fi. fa.* The defence was that the assignment was colourable only, and void as against creditors; and it was urged, as a proof of fraud, that no real change of possession had taken place. Lord DENMAN, C. J., left to the jury, as the material question, whether, when Brinded made over the vessel, it was

(a) There was a clause authorizing Brinded to retain the wherry, &c., till plaintiffs should think fit to take possession.

intended by the parties that the property should pass, or that Brinded should continue the owner. The jury were of opinion that nothing was really intended to pass: and they found a verdict for the defendant.

B. Andrews, in the ensuing term, moved for a new trial on the ground of misdirection, contending that no fraud appeared, and that, even if it did, the deed was valid as against the assignor himself and strangers; and *that the defendant stood in the situation of a stranger, there being no sufficient proof of a *fi. fa.* He cited *Doe dem. Roberts v. Roberts*, [*168 2 B. & Ald. 367; and *Lake v. Billers*, 1 Ld. Ray. 733; *Ackworth v. Kempe*, 1 Doug. 40; and 1 Stark. Ev. 329, 3d ed. A rule nisi was granted. In last Easter vacation, (May 9th,) (a)

Palmer and *J. Wells* showed cause. It must be assumed, here, that no actual change of possession took place. That fact does not necessarily show fraud: *Martindale v. Booth*, 3 B. & Ad. 498; but it may be a proof of fraud; and here fraud is, in effect, found by the jury. *Doe dem. Roberts v. Roberts*, 2 B. & Ald. 367, was the case of a defendant attempting to defeat the action by setting up his own fraud; and the guilt of both parties was expressly relied upon in the judgments of the court: here the action is between one party to the fraud and the sheriff, who may justly urge it as an objection. *Lake v. Billers*, 1 Ld. Ray. 733, was cited in *Martyn v. Podger*, 5 Bur. 2631, as showing that, in trespass against the sheriff for seizing goods, "the defendant, though sheriff, ought to give in evidence a copy of the judgment:" but the court said, nevertheless, that, in the case before them, where the plaintiff was claiming under a fraudulent bill of sale, "it might have been left to the jury, whether the plaintiff was in possession of the goods, or not." That was done here. So in *Riches v. Evans*, 9 C. & P. 640, where the plaintiffs claimed against the sheriff by virtue of a bill of sale, alleged by the sheriff to have been fraudulent, Lord ABINGER left it to the jury to say * "whether this was a *bonâ fide* deed, intended to part with the property, and to convey it to the trustees for [*169 the benefit of the general body of creditors," or whether the assignor was intended to keep possession and to have his goods back again. In *Ashby v. Minnitt*, 8 A. & E. 121, a similar case, LITLEDAL, J., left the same question to the jury; and was held to have done rightly. The real question then, here, is, whether the plaintiffs, under Brinded, had any legal interest in the chattel or not; and they cannot, by the mere signing of a stamped paper, which the jury has found to be a trick, put the sheriff to proof of his title.

But, further, if the sheriff is required in this case to show his authority, there was some evidence of it; for the warrant put in by the plaintiffs recited the writ. In *Haynes v. Hayton*, 6 Law J. K. B. (O. S.) 231, (b) which was an action against the sheriff for money had and received, the plaintiff,

(a) May 9th, 1844. Before Lord Denman, C. J., Patteson and Williams, J.

(b) Easter T. 1828. J. Wells, in citing the case, mentioned also *Haynes v. Hayton*, 7 B. & C. 293, there cited, note (1,) but which was a different case, though arising out of the same transaction.

in order to fix the sheriff with receipt of the money, which he had levied as forfeited recognisances, gave in evidence a letter from the person who had been his undersheriff, addressed to the plaintiff, in these words. "The sessions as I have been informed have remitted the forfeited recognisances due from you, and which, by a writ issued against you, were levied previous to the October sessions, 1824, first directing that the sum of 13s. 4d. should be deducted therefrom; but the lords of the treasury contend that there is no power vested in the sessions to remit moneys levied by the authority of that court for forfeited recognisances. Still, as I have not
 *170] heard further from their secretary, *I am desirous to repay the money levied by the sheriff for such forfeited recognisances, under the authority of the quarter sessions. I will therefore thank you to send me your receipt for the amount, as received of William Chute Hayton, Esq., late sheriff of Herefordshire; and I will pay the same. I shall expect, at the same time, to be paid the fees due to the sheriff. Dated," &c. "John Harris, late undersheriff." PARK, J., on the trial, held "that the letter of the undersheriff, if it was evidence to fix the sheriff with the receipt of the money, was also evidence to infer that he had received it through a proper authority. He therefore held it unnecessary for the sheriff to go into any evidence, and nonsuited the plaintiff." On motion to set aside the nonsuit, Lord TENTERDEN, after reading the letter, said: "You are to make this evidence against the sheriff, and yet not give him credit for an assertion there made, which is in his favour. This seems to me to be the hardest measure possible." And the rule was refused. In *Goss v. Quinton*, 3 Man. & G. 825, the plaintiffs gave in evidence an examination of the defendant before commissioners of bankrupt, to prove that he had taken the property in respect of which the action of trespass was brought. In that examination the defendant had stated the substance of a written agreement, which became matter of defence in the present action: the Court of Common Pleas held that the statement, put in by the plaintiffs, was some evidence of the agreement: and TINDAL, C. J., said it made no difference that the existence of the agreement became afterwards, in the course and progress of the cause, a fact from which some inference favourable to the defendant might be drawn.

*Gunning, contra. If *Goss v. Quinton*, 3 Man. & G. 825, shows
 *171] that the recital in the warrant was some evidence of the writ, that case is not available here, because it was not left to the jury to say, upon such evidence, whether there had been a writ or not. In *Haynes v. Hayton*, 6 Law J. K. B. (O. S.) 231, the proof was much more complete than in the present case: a receipt by the sheriff's officer was first put in, stating that the money, "being five several forfeitures," &c., had been "levied for the sheriff of the county of Hereford;" and then the letter of the undersheriff, again referring explicitly to the proceedings on the part of the sheriff. The sheriff here is without defence on either of the issues. That on Not guilty was proved against him by the production of the warrant. On Not

possessed, the sheriff cannot in this cause allege that the conveyance from Brinded to the plaintiffs was void and the chattel vested in a party from whom the sheriff does not deduce any title. *Fyson v. Chambers*, 9 M. & W. 460, is an analogous case; and *Carter v. Johnson*, 2 M. & Rob. 263, there cited, shows that, on Not possessed, a defendant cannot defeat the plaintiff's action by setting up the right of parties under whom the defendant does not claim. In *Riches v. Evans*, 9 C. & P. 640, evidence of a judgment was given; to make the present case resemble that, a writ, at least, should have been proved. Even if this had been done, it might be a question whether Palmer, the judgment creditor attempting to claim under Brinded in contravention of his deed, was not concluded by it as Brinded himself would have been. The rule on this subject is stated in 1 Smith's Lead. Ca. 11.(a)

*Lord DENMAN, C. J., in this term, (June 10th,) delivered the judgment of the court. [*172

The sole question turned on the effect of a deed conveying a debtor's property to the plaintiffs. The jury found it fraudulent; but the defendant's learned counsel submitted that, though this might be so against creditors, it operated to pass the goods as against the party himself and strangers, according to *Doe dem. Roberts v. Roberts*, 2 B. & Ald. 367, and other cases; and that the sheriff (defendant) ought to have proved the writ under which he directed his officer to act.

We agree in this doctrine: but, cause being shown against this rule, it appeared from my notes of the evidence that the only mode of fixing the sheriff was the production of his warrant, which recited a writ. A case of *Haynes v. Hayton*, 6 Law J. K. B. (O. S.) 231, was cited from The Law Journal: there the court upheld a ruling at Nisi Prius that an undersheriff's letter, produced by the plaintiff to affect the sheriff, was evidence of the facts therein stated, which tended to excuse him. The matter was fully debated in *Goss v. Quinton*, 3 M. & G. 825, where the Court of Common Pleas held that the plaintiffs, assignees of a bankrupt, by putting the defendant's examination in evidence as proof that he took certain property, made his cross examination also evidence in the cause, wherein he stated, in answer to a question from his own attorney, that he had purchased it under a written agreement, without producing or accounting for such agreement, and without notice to produce it. Here, therefore, the proof of seizure involved some evidence of its having been made by the authority of the law, and such evidence as leaves no possibility of doubt as to its truth.

*The validity of the deed as to its merits has been tried in a state of things more favourable to the plaintiff than if the judgment had been proved on the trial. It was urged that this evidence ought to have been submitted to the jury, who ought to have exercised their judgment. [*173

(a) Note to *Twyne's Case*, 3 Rep. 80 b; from "It will be observed," to the end of the paragraph.

on its sufficiency; according to the well established principle that, if their verdict has been or could have been influenced by any evidence improperly received, the losing party has a right to a new trial.(a) But we do not think that principle applicable here, where the specific evidence was neither objected to nor open to any objection, but overlooked by both parties, and, when observed, is, in truth, conclusive on the point. The mistaken view taken by the judge of the law in respect to the validity of the deed against all but creditors could have no effect on the proof of this part of the case, because the state of facts makes it immaterial. Rule discharged.(b)

(a) See *Wright v. Doe dem. Tatham*, 7 A. & E. 313; *Crease v. Barrett*, 1 Cro. M. & E. 919, S. C. 5 Tyr. 458; *De Rutzen v. Farr*, 4 A. & E. 53.

(b) *Glave v. Wentworth, Esq.*, York Spring Assizes, March 7th, 1842, before PARKER, B. Trover against the sheriff for seizing goods under an execution at the suit of Gillett and Habershon. To fix the sheriff, the warrant, reciting the writ of fi. fa., was put in. The plaintiff claimed under an assignment to him from the debtor; the defence was that such assignment was fraudulent and void against creditors. At the close of the defendant's case, *Wortley*, for the plaintiff, objected that the writ should be put in, to show that the sheriff was acting for a creditor. PARKER, B., held that, the assignment being good between the parties to it, and only void against creditors, the writ itself must be produced, otherwise the sheriff was a wrong-doer: and, as the writ could not be produced, he directed a verdict for the plaintiff.

Wortley and *Pashley* for the plaintiff, *Baines* and *W. H. Watson* for the defendant.

In the ensuing term, (April 20th, 1842,) *Baines*, acquiescing in the decision, moved on affidavits of surprise that a new trial might be had on payment of costs; which rules the Court of Exchequer made absolute. See 1 Phill. Ev. 344, et seq., Part i. c. 7, s. 10, 9th ed.

*174]

*RUNDLE v. LITTLE and Another.

In an action for trespass in taking plaintiff's goods, the defendant, having pleaded only the general issue, cannot, even in mitigation of damages, give in evidence a repayment by him, after action brought, of money produced by the sale of the goods.

In trespass for taking plaintiff's goods, Not Guilty being pleaded, and the plaintiff having proved that defendant, an attorney, delivered a fi. fa. to the sheriff, who thereupon took the goods, *querre*, whether defendant may give in evidence a judgment on which the fi. fa. issued.

TRESPASS for breaking and entering plaintiff's dwelling house, and seizing, and taking and converting, his goods and chattels. Count for the seizing, taking, and converting only, alleging special damage. Plea: Not guilty.

On the trial, before COLERIDGE, J., at the Exeter Summer assizes, 1843, it appeared that the alleged trespass was the seizing and publicly selling the plaintiff's goods to satisfy a debt alleged to have been due from him to one John Eastcott. The defendants were attorneys in partnership, employed on the occasion by Eastcott; and the proof connecting them with the trespass was, that they had handed the writ of fi. fa. to the sheriff. The defence was, that they had done nothing more than was required by their duty as attorneys, and, therefore, were not liable; and *Codrington v. Lloyd*, 8 A. & E. 449, was cited. To support this defence, they offered in evidence the judgment on which the writ had been issued. The evidence was objected to, but admitted by the learned judge, though with doubt. It was stated on cross examination that proceedings had been taken to set the

judgment aside for irregularity; but there was no proof that it had been set aside. It was also proved for the defendants that the money levied had been paid back to the now plaintiff, but after action brought. This evidence was likewise objected to. COLERIDGE, J., *stated to the jury as his opinion, that if an attorney in a case of this kind has only acted [*175 according to his duty as an officer of the court, as by merely issuing a writ, he is not liable to an action; that the present defendants appeared to have acted only in the ordinary course of business; and that the charge of malice could not be raised in this form of action: he, therefore, left it to the jury, in the first place, to say whether or not the defendants were guilty; and, secondly, if the verdict was guilty, to fix the amount of damages; stating as his opinion that they could scarcely be too small; and observing that the levy had been made under a judgment, writ, and warrant, and that the money had been repaid after action brought. The jury found for the plaintiff, damages one farthing.

Crowder, in Michaelmas term, 1843, obtained a rule nisi for a new trial, on the ground of improper reception of evidence. In last Easter term(a)

Cockburn and *M. Smith* showed cause. The judgment was admissible in defence under the general issue; *Codrington v. Lloyd*, 8 A. & E. 449. There the declaration was for trespass and false imprisonment; Not guilty was pleaded, and also a plea stating that defendant, an attorney, was retained by F. P. to sue out a ca. sa. against plaintiff, whereupon he sued out such writ, and, as attorney of F. P. and by his command, delivered it to the sheriff to be executed, and by virtue thereof plaintiff was arrested. To this it was replied that the writ was irregularly sued out, and was afterwards set aside by rule of court: *and, on demurrer, the plaintiff had judgment. But PATTESON, J., said: "If, indeed, the attorney had [*176 done no act beyond what his duty required, that might be made a defence, as in a case in *Espinasse*; but that would be under the general issue." The case alluded to seems to have been *Sedley v. Sutherland*, 3 Esp. 202, where Lord KENYON held that an action of false imprisonment did not lie against attorneys who had acted in causing the plaintiff to be arrested, "unless it could be proved that they had gone beyond the line of their duty, by which the plaintiff had suffered." If the attorney pleads the judgment specially, and as a bar, without more, to the action, it may be open to the plaintiff to show that it was an irregular judgment; but it does not follow that the attorney, on the general issue, may not put in the judgment, not as a bar per se, but as evidence for the jury, and as a step in proving that he did nothing beyond the ordinary course of his duty. And both this evidence and the repayment, though after action brought, were admissible at least in mitigation of damages.

Crowder, contra. The defendants were clearly liable on the issue upon Not guilty, according to *Barker v. Braham*, 3 Wils. 368; *Bates v. Pulling*, 6 B. & C. 38, and other cases; and the judgment was no evidence in

(c) May 1st. Before Lord Deane, C. J., Patteson and Coleridge, Js.

defence. [Lord DENMAN, C. J. We acted upon *Barker v. Braham*, 3 Wils. 368, lately, in *Green v. Elgie*, 5 Q. B. 99. PATTESON, J. In *Barker v. Braham*, 3 Wils. 368, the judgment was set aside for irregularity.] So it was here. [PATTESON, J. That does not appear on the evidence.] The plaintiff was not called upon to prove it on the issue upon *177] Not guilty. If the judgment *had been pleaded, the plaintiff would have shown in answer that it was set aside for irregularity. Lord KENYON's dictum in *Sedley v. Sutherland*, 3 Esp. 202, is a hasty one, and cannot be held good law. [Lord DENMAN, C. J. There may be an acting by the attorney which is not in reality a dealing with the judgment at all. He may act like a mere postman. This was perhaps meant by Lord KENYON in *Sedley v. Sutherland*, 3 Esp. 202, and by my brother PATTESON in *Codrington v. Lloyd*, 8 A. & E. 449, 451. COLERIDGE, J. If the attorney means to say that he did not really deal with the judgment at all so as to incur responsibility, (which, it seems conceded, might be the case,) he must base his proof upon the judgment, and proceed to show that, although there was on his part some interference with the transaction complained of, his dealing was not of a kind which involved responsibility.] If the judgment was illegal, the defendants are trespassers; if it can be sustained, they should plead it in justification, otherwise the plaintiff is taken unprepared. The decision in *Codrington v. Lloyd*, 8 A. & E. 449, 451, is in favour of the present plaintiff; the dictum of PATTESON, J., was founded upon that of Lord KENYON in *Sedley v. Sutherland*, 3 Esp. 202, and would probably not be sustained on consideration. Its effect would be to exempt all servants and agents in trespass. The attorney acting under the directions of the client is in the same situation as he. [PATTESON, J. A case may be put in which the attorney could not justify, and yet might not be liable. Suppose there were a regular judgment and writ of *fi. fa.*, and the sheriff seized goods beyond the jurisdiction.] *Sowell v. Champion*, 6 A. & E. 407, was such a case; but there the evidence was that the seizure *out of the jurisdiction was not authorized by the attorneys. *178] [PATTESON, J. It may come to this: that a plaintiff must show, not only that the attorney sued out the writ, but why the execution of it was a trespass.] *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (June 8th,) delivered the judgment of the court.

In this case a rule nisi was obtained for a new trial in consequence of the admission of improper evidence; viz., in an action of trespass for seizing the plaintiff's goods, a judgment recovered, which had been afterwards set aside for irregularity by the court; also that the defendant repaid the money levied after action brought. This, at all events, we think objectionable. The rights of parties at the trial are the same as they were at the commencement of the suit: or, if they are changed, a plea puis darrein continuance ought to place the new facts on the record. It is important to uphold the principle that a plaintiff is entitled to recover by way of damages all that

at the commencement of the suit he has lost through the wrongful act for which the defendant is sued. Rule absolute.

*The following case is published as early as possible on account [*179 of its immediate practical importance.

The QUEEN v. The GREAT WESTERN Railway Company.

January 22.

The Great Western Railway Company were occupiers of a railway, their property, and constructed by them, and of branch railways which they rented: and they used the several lines as carriers for hire, working the whole as one concern. In the parish of T., through which the main line passed, they were rated for the railway as follows.

The gross receipts on the several railways were added together, and the total divided by the number of miles in all the railways. The expenses on all, allowable as deductions from poor rate, were added together and divided in the same manner. The expenses on the number of miles in T., the calculation for each single mile being as above, were then subtracted from the receipts thereon, and the assessment was made on the residue, with an allowance for interest on the plant or movable stock, and for tenants' profits, including profits of trade.

On appeal against the rate, further deductions were claimed, as follows; and the sessions stated a case for the opinion of this court on the legality of them.

1. For stations and other buildings appurtenant to, and necessary for the profitable enjoyment of, the railway, but rated or ratable separately from it, and in other parishes than T. *Held*, allowable.
2. Allowance having been made in the rate for "maintenance of way," a further deduction was claimed for depreciation and wear and tear of rails and sleepers, being the solid timber and iron work of the principal line. The renewal of these had been paid for out of the company's capital, not their revenue. *Held*, not allowable.
3. Interest upon outlay in forming the company, obtaining their act of incorporation, (5 & 6 W. 4, c. cvii.,) raising the capital, and other original expenses. *Held*, not allowable.
4. "Income tax paid by the company in pursuance of stat 5 & 6 Vict. c. 35, amounting in the whole to 10,000*l*." *Held*, allowable so far as regards the tax imposed in respect of mere occupation.
5. "Additional parochial assessments, not actually paid, but which will be payable in consequence of the recent decisions of this court on the rating of railways." *Held*, not allowable.
6. The branch lines were worked at a loss, which the company incurred solely on account of the increased traffic occasioned by those lines on the principal railway; and a deduction was claimed for this loss. *Held*, not allowable.
7. In estimating the tenants' profits, a percentage was taken on the original value of the movable stock, at such a rate as might reasonably induce a lessee, obtaining that amount of profit, to pay the residue of profits as rent. The appellants contended that the percentage should have been taken on the gross receipts. *Held*, that this was a question for the sessions, not for the Queen's Bench.
9. (a) The following increase of assessment was claimed by the respondents. The movable stock had, in making the rate, been estimated at its original value, which exceeded the actual value at the time of assessment. The respondents insisted that any calculation of the value for the purpose of reducing the rate, should be taken according to the latter state of the property. *Held*, that the estimate ought to be so taken.

On appeal against two several rates, bearing date respectively 3d November, 1842, and 16th February, 1843, in the former of which The Great Western Railway Company were rated, as occupiers of the Great Western Railway with the appurtenances, in respect of a portion of [*180 the said railway extending two miles and one sixteenth of a mile in length within the said parish, and containing thirty acres of land, at the sum of 2475*l*., and in the latter in respect of the same property at the sum of 3093*l*.

(a) An eighth question was raised, which became immaterial.

15s., the said two rates being respectively at the rate of 1200*l.* and 1500*l.* per mile, the sessions, (Berks, Easter, 1843,) confirmed the rates, subject to the opinion of this court on the following case.

The Great Western Railway Company are established by a certain act passed, &c., (5 & 6 W. 4, c. cvii., local and personal, public, and three other acts, &c., 6 & 7 W. 4, c. xxxviii., 7 W. 4, & 1 Vict. c. xci., and 2 & 3 Vict. c. xxvii., local and personal, public.) Copies of these acts, and of the two half-yearly reports made at two general meetings of the company, held 18th August, 1842, and 10th February, 1843,(a) which accompanied the case and were admitted to be correct statements, were to be deemed part thereof, &c.

Under the power contained in those acts, or one of them, the company have completed a line of railway from Paddington in the county of Middlesex to Bristol, being a length of one hundred and eighteen miles : and this railway, for two miles and one sixteenth of a mile thereof, passes through the parish of Tilehurst.

The Great Western Railway Company, in order to increase the traffic on their line, became, and were before and at the making of the rates, lessees of a branch line from Bristol to Taunton in the county of Somerset for a term of years, on the terms of paying to the proprietors thereof for the use of the whole of the said branch line, *being a distance of forty-four
*181] miles, including the right to use the stations, and the right of taking all rates and tolls for the conveyance of passengers, cattle and goods, the sum of 50,000*l.* per annum.

In the like manner and for the same purpose the said company became lessees of a branch line from Swindon to Cirencester, being a distance of eighteen miles ; and for the use of which, including all the rights and privileges above mentioned, the said company, at the making of the rates, were liable to pay to the proprietors thereof a rent of 17,000*l.* per annum.

By reason of the incomplete state of the branch railways, the whole length of permanent way worked by The Great Western Railway Company, both as proprietors and as such lessees, amounted, during the current year of rating, to one hundred and seventy-five miles only. The company, as such lessees of the two last mentioned lines, were in fact, at the time of making the rates, incurring annually a loss of 10,500*l.*, over and above the actual net receipts, in respect of those two branch lines, the rents exceeding by that sum the net profits earned on those lines : and this loss was incurred solely for the purpose of benefiting by the increased traffic occasioned by those lines on the Great Western Railway. The appellants do not themselves maintain or repair the above branch railways, or the buildings connected with them : but they pay rates in respect of them ; and they carry on the business of carriers jointly on the whole of the united lines as one entire concern.

The said company, since the passing of their act and the completion of

(a) See p. 190, 191, 192, post, where the only parts of the statute and reports which appear to be material in this case are stated.

the railway, have not only taken certain tolls authorized by the said act, but they have also provided the locomotive powers and carriages, and *have themselves conveyed upon all the three railways passengers, cattle and goods for hire in addition to the said rates and tolls; and [*182 in point of fact the said company, since the completion of the said railways, have been in exclusive occupation of the said railways as carriers, no other carriers having availed themselves of the privileges, conferred by the act, of providing carriages or power independent of the company.

There is no station or building in Tilehurst; nor is there any extraordinary profit or expense in the repair or maintenance of the way in that parish: but the expenses may, for the purpose of these rates, be fairly taken as proportionable to the length in the parish as compared with the whole length of the united lines. The different stations and buildings throughout the lines are to be considered as rated separately from the railway.

The following are the detailed particulars of the mode in which the rate allowed by the court of quarter sessions was ascertained by the parish officers.

The gross receipts of each mile in the parish of Tilehurst were ascertained to be 3680*l*.

The expenses of the whole line of the three railways, during the period to which the rates apply, amounted to the sum of 257,205*l*. 14*s*. 11*d*., comprised under the following heads.(a)

1. Maintenance of way	-	-	-	-	£49,643	6	5
2. Locomotive account: viz., coal, coke, repairs, wages to drivers, firemen, &c., oil, tallow, and all other incidental expenses	-	-	-	-	74,725	9	0
*3. Carrying account: viz., wages to guards and conductors, police messengers and porters. Clothing, repairs of carriages, stores, &c.	-	-	-	-	60,714	15	2
4. General charges: viz., superintendents' and clerks' salaries, advertising, printing, stationery, and sundries, including travelling expenses	-	-	-	-	23,126	2	11
5. Disbursements for repairs and alterations of stations and buildings connected with the railway	-	-	-	-	1,682	6	8
6. Compensation for fire and other accidents, and other annual returns and allowances connected with the trade	-	-	-	-	1,536	10	0
7. Government duty on gross receipts from passengers	-	-	-	-	25,783	4	6
8. Rates and taxes of all kinds assessed on the company in respect of the property, and actually paid (other than the property tax)	-	-	-	-	11,340	14	8
9. Direction and office expenses	-	-	-	-	8,643	5	7
Total					£257,205	14	11

(a) The figures which follow in this and the next page are in some respects inaccurate, but have been compared, and agree, with those of the original case as finally settled by consent of the parties.

Adding to this the annual depreciation of the plant or movable stock necessary for working the whole line of railway together with the branches, which amounted to 20,000*l.* a year, the total expenses amounted to 277,205*l.* 14*s.* 11*d.*

The proportionable expenses of one mile, being $\frac{1}{18}$ th	
of the whole	£1,584
*184] *The value of the whole plant or movable stock at its first cost	
was about 580,000 <i>l.</i>	
On this sum the respondents allowed 5 <i>l.</i> per cent. as	
interest on that stock	£29,000
Ten per cent. as tenants' profits, including the profits	
of trade	58,000
	<hr/>
	£87,000

The portion of this in respect of one mile in Tilehurst parish (being $\frac{1}{18}$ th of the whole) 497

From the gross receipts for each mile in Tilehurst they then deducted the proportion of the above expenses chargeable on it, and the portion of the above percentages due in respect of it, thus—

Gross receipts	£3,680
Expenses	£1,584
Interest and profits	497
	2,081
	<hr/>
	£1,599

This balance of 1599*l.* was taken by the respondents, and found by the sessions, to represent the net rateable value of each mile of the railway in Tilehurst parish: and the sessions find the above amounts and sums to be correct, but submit to the judgment of this court the principle on which the calculation is founded, and the propriety and sufficiency of the deductions. They further state that the percentage mentioned above as tenants' profits, is not to be taken as the actual profits of the company from trade, the whole of their receipts and profits being in fact derived directly from their trade, but the sessions find that percentage to include such a reasonable profit of trade as would induce a lessee who carried on the like business under the

185] *same circumstances to forego the rest and to pay it as rent.
The appellants contended that, assuming the estimate of the respondents to be founded on just principles, the following additional deductions ought to be made.

1. The buildings, stations, shops, sheds and other erections appurtenant to the Great Western line alone, rated or rateable separately from the railway, and necessary for the profitable enjoyment of it, may be taken, for the purposes of these rates, as worth 35,000*l.* a year rateable value at the time of making the rates: and the appellants claim a portion of this sum to be deducted from the receipts in Tilehurst parish. This deduction,

If to be taken as $\frac{1}{118}$ th of the whole, 296*l.* per mile.

If to be taken as $\frac{1}{175}$ th of the whole, 200*l.* per mile.

In like manner, the annual value of the buildings, stations, &c., on the two branch railways above mentioned, may be taken at 10,000*l.* per annum; and, if the united value of these buildings in all the three railways is a proper deduction, then the deduction, (being $\frac{1}{175}$ th of the whole,) 257*l.* per mile.

2. The appellants further claimed a deduction in respect of depreciation and wear and tear of rails and sleepers, being the solid timber and iron work of the Great Western Railway alone.

This expense is not included in the item of "maintenance of way" above mentioned; nor has it been found necessary as yet by the company to appropriate any annual fund for this purpose, because this expense has hitherto been taken from the capital, and not deducted from the revenue. But such deduction, if proper, is to be taken at 20,000*l.* a year in respect of the whole of the Great Western Railway, exclusive of the branches.

*If divided by 118, the amount per mile is 169*l.*

[*186

If divided by 175, the amount per mile is 114*l.*

3. The appellants further claim the following deductions. Five per cent. interest on 420,000*l.*, being the outlay in forming the Great Western Railway Company, obtaining the act of incorporation, raising the capital, and other original expenses; 21,000*l.* per annum.

4. Income tax paid by the company in pursuance of stat. 5 & 6 Vict. c. 35, amounting in the whole to 10,000*l.*

5. Additional parochial assessments not actually paid, but which will be payable in consequence of the recent decisions of this court on the rating of railways; 12,000*l.* at least. This last item includes the rates on all the three railways occupied by the company. It has not yet been paid; nor can it be clearly ascertained until the deductions are settled in each rate.

6. The annual total loss on the two branch lines already referred to, 10,500*l.*

The appellants further contended that, instead of ascertaining the tenants' profits by a percentage on the original value of the plant or movable stock, they will be more correctly represented by a percentage on the gross receipts, and that for that purpose fifteen per cent. on 3680*l.* should be deducted, viz. 552*l.*

It was stated on the part of the respondents that the plant or movable stock of the company was, at the time of making the rate, depreciated in value: and the sessions find that, in fact, it was so depreciated, and was then worth about 500,000*l.*, and not the sum of 580,000*l.*, as above stated: and, if any of the deductions demanded by the company were allowed, then the respondents claimed to take such reduced value as the sum upon which interest and tenants' profits should be calculated, *that is to say, fifteen per cent. on this sum, 75,000*l.*; and the portion of this in respect of a mile in Tilehurst, 428*l.*

[*187

The sessions find the several sums and particulars above mentioned correct in amount for the purposes of the present case : and they refer to this court the propriety and principle of all or any of the above deductions.

The rates are to be confirmed, quashed or amended, or the appeal remitted for further inquiry, according to the opinion of this court upon all or any of the above points.

The case was argued in Michaelmas term, 1844.(a)

Whateley, *Tyrophitt*, and *Bros* for the respondents. The deductions must be regulated by the principle laid down in stat. 6 & 7 W. 4, c. 96, s. 1.

1. The company are not entitled to any deduction for stations or buildings not situate in Tilehurst, and which are rated in other parishes.

There is no doubt that the company derive great profits from some of these buildings : but the profits so accruing in any particular parish are not brought into account for the purpose of increasing the rate ; neither should the rates paid for all or any of them in other parishes diminish the rate in Tilehurst. [WILLIAMS, J. Is that so, if those premises are rated to their full value in the other parishes ?] Tilehurst does not impose such rate ; nor ought it to affect the calculation of that value in which Tilehurst is interested. In *Regina v. The London and South Western Railway Company*, 1 Q. B.

*188] 558, 585, the *question is put, in the judgment of the court : “ Will it make any difference in the principle, that the railway is in more parishes than one, and that we are now dealing with a parish in which, so far as appears, there is no station house or other appendage to the railway ?” And the answer was : “ We think not ; the subject matter of the rate in any particular parish is, no doubt, the beneficial occupation of the land there, and you cannot draw into the rate the value of the occupation of buildings elsewhere ; yet, as you are to rate on the value in the parish, however occasioned, you cannot strike off any portion because it would not have existed but for the occupation of buildings in another parish : still it exists, and in the parish, and therefore cannot escape the rate there.” The deduction here claimed was allowed in *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18, 41 ; but the point was not disputed. In *Rex v. The Trustees of the Duke of Bridgewater*, 9 B. & C. 68, the defendants were rated for their canal with the tolls, and for their wharfs and buildings adjacent, and no deduction was claimed for the rate laid upon these last. A like observation applies to *Rex v. Palmer*, 1 B. & C. 546, and other cases of the same class. The principle laid down by BAYLEY, J., in *Rex v. Kingswinford*, 7 B. & C. 236, and *Rex v. Lower Milton*, 9 B. & C. 810, with respect to canals, is, that the proprietors are to be rated “ in respect of the land which they occupy in every parish through which the canal passes, and for that value which the land there produces,” 7 B. & C. 241 ; “ and that,

*189] whether the subject matter of the occupation be productive of itself, or rendered productive by *something brought from another parish, or by being used in conjunction with property in another parish, no differ-

(a) November 13th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, J.

ence is to be made in the mode of rating," 9 B. & C. 818. As was said in the judgment of this court in *Regina v. The Grand Junction Railway Company*, 4 Q. B. 40: "Suppose two estates of equal size and in all respects of equal fertility; but one is surrounded by excellent roads, or has a canal near to it, or is near to a large market, and the other is without these advantages; of course the rent and the ratable value of the one will be larger than the other; yet the tenant would take no more by the lease of the one than of the other." In the present case, therefore, the property occupied in Tilehurst must be estimated according to the profit of such occupation in Tilehurst exclusively, and without reference to the value of property elsewhere by which the profit in Tilehurst may be indirectly increased; consequently the burdens on such property elsewhere cannot be material to an estimate of the value in Tilehurst. In *Rex v. Woking*, 4 A. & E. 40, the thorough trade was divided by the whole length of the canal; the short trade passing through Woking, by the distance passed over; and the tolls earned by that traffic which did not pass through Woking were excluded. That is the principle followed here, the rate being based on the receipts per mile of the company in the parish of Tilehurst. In *Rex v. The London and South Western Railway Company*, 1 Q. B. 558, the rate was calculated in a different way: the sessions found the rack rental of the whole railway, and then calculated the ratable value in the parish by taking such a proportion of the whole rack rental as the receipts from traffic in the parish bore to the gross receipts of the whole line. Here the rental of the whole railway [*190 is not found: but the rental of the portion in Tilehurst is calculated by making certain deductions from the gross receipts there. One deduction to be made is in respect of the tenants' profits. As to the mode in which these ought to be calculated: the company claim to deduct 20 per cent. from the gross receipt, under this head. But there is no relation between the gross receipt and tenants' profits; the one may be very large, and the other very small. The proper mode of calculating them is to ascertain the capital required, and then to allow interest on that sum, and a percentage equal to the risk incurred by the tenant, and the industry required. That mode was adopted in *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18, and sanctioned by the court. In *Rex v. The London and South Western Railway Company*, 1 Q. B. 558, a different mode seems to have been followed by consent. It is from some proportion of the net profits, and not from the gross receipts, that the tenants' profit is to be sought. The company's half yearly report under the head of "revenue account" shows the total annual expenditure of the company over the whole railway; this amount, divided by the length of railway, gives the total expenses of one mile in the parish of Tilehurst; and this, deducted from the gross receipts from that mile, gives the net profit of such mile. The question is, what portion of this belongs to the tenant in respect of his capital, skill and risk: because what remains after that deduction is the ratable value. Rack rent is defined to be the profit of land, independent

of the profit of capital and labour, and the *cost of cultivation.

*191] The cases are all collected in *Regina v. Capel*, 12 A. & E. 382.

The parish here ascertained the rack rental in this very mode; from the net profit they have deducted two percentages on the capital employed, one for interest, and the other a remuneration to the tenant for his skill and the risks he runs. To make a further deduction for the rent of stations and charge a portion of that against the receipts in Tilehurst, would be to rate only a part of the profits there; for there is no station in that parish; and, though the stations may contribute to increase the receipts in Tilehurst, they, being rateable in the parishes where they are situate, are a proper charge upon the traffic there, but not in Tilehurst.

2. Neither is any deduction to be made for depreciation of the permanent rails and sleepers. This is in fact an outlay to replace capital, and has been so treated by the company in their accounts rendered to their proprietors under stat. 5 & 6 W. 4, c. cvii. s. 145, which requires them to make up accounts twice in every year "of the charges and expenses attending the making, maintaining, and carrying on the said undertaking, and of all other the receipts and expenditure of the said company, up to those periods respectively." These are to be laid before the proprietors; and they appear on the August and February reports forming part of the present case. The 146th section provides, that "no dividends shall be made exceeding the net amount of clear profit at the time being in the hands of the said company, nor whereby the capital of the said company shall in any degree be reduced or impaired." In their accounts with the proprietors, the company

*192] have treated this item as an additional outlay of *capital, and not as an annual charge upon their revenue: they have no right, therefore, to represent it as an annual charge to be deducted from their profits, for the purpose of reducing the amount of ratable value. The depreciation of the plant may be deducted, and has been allowed for by the sessions, because the company lay aside a portion of the revenue to meet that expense; but the reproduction of the permanent rail hitherto defrayed wholly out of the company's capital is so much added to their original outlay.^(a) The claim to such a deduction will probably be grounded on *Regina v. The Cambridge Gas Light Company*, 8 A. & E. 73, where the judgment on this point is founded upon *Rex v. Lower Milton*, 9 B. & C. 810, and the authorities there cited. On reference, however, to these, it seems that the suggestion of allowing for a depreciation fund arose first in *Rex v. Tomlinson*, 9 B. & C. 163, where BAYLEY, J., said: "The annual profit or value is always a part only of the annual rent paid to the landlord. Some portion of that rent ought to be set apart to form a fund for repairing or rebuilding when necessary; in other words, to maintain, or reproduce the subject of occupation." But, as the learned judge observes just before,

(a) The half-yearly reports, mentioned, p. 180, ante, were referred to in confirmation of these statements; and Hill, for the appellants, admitted that 10,000*l.* half-yearly was allowed in the accounts for depreciation of the plant, not of the permanent railway.

"it makes no difference in the amount of the rate, whether the occupier be tenant or owner:" the rate is a tax on the occupation: and can it be said that an occupier, though not the owner, is presumed, in the case of a house or colliery, to establish a fund for repairing or rebuilding? The *allowance in *Regina v. The Cambridge Gas Light Company*, 8 A. & E. 73, 77, was, in terms, only for "the annual cost of the renovation" of the works previously mentioned. In *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18, 23, a deduction was made "for renewing or reproducing those portions of the subject of the rate which are of a perishable nature, such as the rails, chairs, and sleepers, &c., when rendered necessary by accident or decay:" but this was not contested. By the Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 1, the rate is to be calculated upon the rent at which the premises might reasonably be expected to let "from year to year, free of all usual tenant's rates and taxes." The creation of a fund for repairing and rebuilding is not a usual charge upon a tenant, especially on a holding from year to year. In *Rex v. The Trustees of the Duke of Bridgewater*, 9 B. & C. 68, no charge of this kind seems to have been taken into account. In *Rex v. The Hull Dock Company*, 5 M. & S. 394, where the question was, whether the company were exempt from poor rate during a year in which they had rebuilt part of their docks, and their expenditure, consequently, had gone much beyond their receipts, the propriety of allowing for a renewal fund was not suggested at the bar or by the court.

3. The claim in respect of outlay in forming the company, obtaining the act of parliament, and the other original expenses, is as unreasonable as if an individual claimed a like allowance for the costs of making out the title to his estate. No part of the language in stat. 6 & 7 W. 4, c. 96, s. 1, authorizes such a deduction.

*4. The attempt to charge the parish with the income tax on the company's property is equally unauthorized. [*194

5. So also is the deduction claimed in respect of rates not yet charged. "The propriety of a poor rate can only be determined with reference to the facts found to be actually existing when it was made:" *Regina v. The Grand Junction Railway Company*, 4 Q. B. 35; judgment of the court.

6. The losses on the branch lines cannot affect the ratable value of the Great Western Railway. The argument as to the stations not situated in Tilehurst, applies in a great measure to this part of the case. To take these losses into consideration would be substituting an average calculation for that which the present assessment proceeds upon. And, as to the branch lines, the question is, whether the company has a beneficial occupation of them, not whether they have been a profitable or a losing bargain in any particular year; *Rex v. Parrot*, 5 T. R. 593; *Regina v. Vange*, 3 Q. B. 242; *Rex v. Attwood*, 6 B. & C. 277; *Rex v. Mirfield*, 10 East, 219; *Rex v. The Hull Dock Company*, 5 M. & S. 394; *Rex v. Chaplin*, 1 B. & Ad.

926. If the owner of a pleasure garden, to which persons were admitted for money, kept a boat to bring persons across a river to the garden, could he claim a deduction from the rate upon his garden for the expenses of the boat?

7. On the question, whether the tenants' profits should be ascertained by a percentage on the original value of the plant or movable stock, or by a percentage on the gross receipts, the court declined to give *any judgment. *Regina v. The Cambridge Gas Light Company*, 8 A. & E. 73, and *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18, 38.(a) were recited for the respondents.

8. The question, whether, under the heads of reduction first and secondly above stated, the division should be by one hundred and eighteen or one hundred and seventy-five, was rendered immaterial by the judgment of the court.

9. The respondents' counsel contended that any deductions to be estimated by the value of the company's plant or movable stock should be reckoned according to the deteriorated value, as suggested in the case.

Hill and Carrington, contra. The receipts in this case are estimated on the principle which seems to have been recognised in *Rex v. The Oxford Canal Company*, 10 B. & C. 163, and was adopted in *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18, where the court said, in giving judgment: "We understand them," (the company,) "to admit the principle of considering the whole line as entire, and to arrive at the exact sum, at which they contend that the rate in the respondent parish should be fixed, by a mileage division of the whole length; a principle very convenient in itself, and rightly adopted by consent." It may be admitted, here, that that principle is correctly adopted. But it follows that an abatement of the rate in Tilehurst must be made, on account of the stations in other parishes. The earnings on the whole line are calculated indiscriminately, not distinguishing so much as taken for the use *of the railway and
*196] so much in respect of the stations; and they are thrown into an entire sum. The earnings of each parish being taken according to the apportionment on the mileage principle, and all added together, the sum set down for the receipts of the whole line, (including the branches,) exhausts all sources of profit. The stations and other buildings cannot be reckoned in this calculation as sources of profit, but are considered as burdensome appurtenances necessary for the enjoyment of the line, so that it may produce the profit apportioned as before stated. The expenses of these must therefore be considered as a charge to be allowed for in estimating the ratable profits, (like the expense of supplying water to a canal; *Rex v. The Oxford Canal Company*, 10 B. & C. 163, 177;) if that allowance be not made, the profits are over stated. And, if made, it must be subtracted from the mileage earnings. Supposing that a profit from the stations could be considered as accruing partly in Tilehurst, then Tilehurst must receive it

(a) See the argument in *Regina v. Capel*, 12 A. & E. 365.

as trustee for the other parishes which are rated for those premises : but the fact is that the profits are earned, mile by mile, from the railway properly so called ; the stations contribute equally on every mile to the production of earnings there ; and there are no means by which the expenses of any station can with justice be referred to any limited part of the line, except by distributing the whole expenses of the stations over all the line on the principle of mileage.

2. As to the depreciation fund, it is scarcely disputed on the other side that, whenever works have been done to which a fund of that kind is applicable, allowance should be made for them in the estimate for that *year. The argument, in substance, is only that no such fund has [*197 at present been set apart. But, even with respect to ordinary repairs, that is no answer. In *Rex v. The Hull Dock Company*, 5 M. & S. 394, where the appellants argued that the works done in the particular year had absorbed all the profits, and that the company could not from year to year retain the proceeds to answer future objects of expense, the court said that the company were not obliged in each year to make such a dividend as prevented the reservation of any fund for works to be done in after years. The true principle of rating is to estimate profits and expense communibus annis ; upon that principle the rule of assessment in stat. 6 & 7 W. 4, c. 96, s. 1, is framed. In *Regina v. The Cambridge Gas Light Company*, 8 A. & E. 73, this court recognised, as a deduction from that rent which the act makes a criterion, the allowance, "where the subject is of a perishable nature, towards the expense of renewing or reproducing it;" and *Rex v. Lower Mitton*, 9 B. & C. 810, was considered as warranting such allowance. In *Rex v. Tomlinson*, 9 B. & C. 163, the court exemplified the rule on this subject by houses, of which "the annual profit or value is always a part only of the annual rent paid to the landlord. Some portion of that rent ought to be set apart to form a fund for repairing, or rebuilding when necessary ; in other words, to maintain, or reproduce the subject of occupation." Practically, the landlord himself does not make any such reservation ; but whether he does so or not cannot affect those who have to calculate the assessment. It is not denied by *the respondents that an allowance ought to be made for maintaining the subject of occu- [*198 pation in a state to command the supposed rent ; and renewal of the solid and essential parts is only maintenance on a large scale. Repair in the ordinary sense does not meet all modes of deterioration. The appellants, therefore, are right in claiming an allowance for these costs of renewal on a distributive calculation, and not waiting to claim them till a great expense of renovation shall actually have been incurred in one year, when they might be told that the cost ought to have been reckoned communibus annis. If the company have in their accounts treated this item as an outlay taken from capital, and not as a charge on revenue, that cannot make any difference to the parish.

3. The expenses of forming a company, obtaining an act of parliament,

&c., ought to be allowed. The costs of the plant are deducted, because without them the trade could not be carried on at all; on the same principle the expenses necessary to the first establishment of the undertaking should be allowed also.

4. The income tax is an outgoing, to be deducted, like the others, from the gross receipts, in order to arrive at that which fairly represents ratable profits: and this deduction is consistent with stat. 5 & 6 Vict., c. 35, s. 1, schedules (A.) and (B.), the latter of which charges the tenant of lands in respect of his occupation; and with sect. 1 of stat. 6 & 7 W. 4, c. 96, directing that the assessment to the poor rate shall be "free of all usual tenant's rates and taxes."

5. On the principle of estimating by the expenses *communibus annis*, poor rates not yet imposed may be *taken into consideration: and, though the amount is uncertain, 12,000*l.* is given as a minimum. [COLERIDGE, J. This item can be considered only in future rates.]

6. The loss on the branch railways is an expense incurred in bringing traffic to the main line. In the case put on the other side, of a person keeping a garden, the expense of the boat, if paid by the owner of the garden, ought to be deducted, supposing his rack rent to be ascertained on the principle applied to railways. It is an expense which must affect the rent. He would not give so much for a garden which could only be enjoyed at the cost of keeping and working a ferry boat as for a garden free from such a burden and yet equally profitable. *Rex v. The Oxford Canal Company*, 10 B. & C. 163, applies to this part of the case. In *Rex v. Parrot*, 5 T. R. 593, cited for the respondents, the lessee of a colliery alleged that the colliery, the entire subject matter in respect of which he paid rent, was unprofitable, and therefore not ratable. But the occupation, at a rent, so long as he held, might be deemed conclusive evidence against him that the premises occupied were profitable. Here no tenant would take the branches separately from the main line so long as they are worked at a loss. If such a tenant could be found, it is clear that the tenant of the main line would pay a greater rent than a tenant for the whole will now pay, because, while the main line would still receive the advantage of the supply of traffic furnished by the branches, the tenants of such main line would be relieved from the burden which the loss on the branches now throws on the concern.

Suppose the traffic were *conveyed along the branches gratuitously
 *200] for the sake of the mileage along the main line; in such case the branches would be strictly analogous to the stations, which perform a service not made the foundation of any charge. If then the argument of the appellants on the first head is well grounded, the whole cost of the branches would have to be deducted. At present the burden does not consist of the whole cost, but of the balance which is found by subtracting the amount of the returns given by the branches from that of their expenses. This balance, which is the net loss upon the branches, is therefore a fair allowance.

9.(a) The depreciation of the company's stock ought not to be taken into account. The question here must be, not what is the present state of the capital, but what capital has been actually embarked.

Cur. adv. vult.

Lord DENMAN, C. J., in Hilary term, (January 22d,) 1846, delivered the judgment of the court.

This case has stood over for some time from the wish to afford it the fullest consideration: and, as our decision must be governed by the principles laid down in the two cases of the *South Western*,^(b) and *Grand Junction*^(c) railways, it may be convenient to recapitulate briefly what was in those cases decided: not that they introduced any new principle into the law of rating, but because the circumstances under which the established principle was applied were somewhat novel.

*We there laid down that, although the profits of trade carried on by the occupier of the land upon it cannot be made directly the subject of the rate assessed in respect of such occupation, and the value of the occupation alone was the proper subject, yet in that value was to be included whatever at the time formed part of it, whether permanently or not, and from whatever source derived, and, therefore, of course, not less so although derived, in any proportion, from the fact of the trade being so carried on upon it. Further, that, although the sum to be sought was that which, after all due deductions made, a tenant might be found to give by way of rent from year to year in order to be placed as occupier in the same position as the party rated, yet this was to be sought, not by dryly considering what rent would be given for so many miles of railway as happened to be in the rating parish, apart from all the actually coexisting circumstances; but by including in the consideration all such as would necessarily attend upon the occupation under the demise, and influence the tenant's mind as to the amount of rent which he would give. [*201]

In the application of these principles the practical difficulty for those who assess the rate in cases of such complication as railways often present will be to distinguish accurately between that which is properly referable to the trade alone, and that increase of value which the carrying on of the trade upon the land gives to the occupation of it. The case of the *Grand Junction Railway*, 4 Q. B. 18, presented many circumstances the same as exist in the case now before us; and we thought that the parish officers there had successfully met the difficulty. We are now to examine the rate stated in this case only, however, as to its principles, and so much of its details as involve principle: beyond that, and especially as to the accuracy of calculations, the questions must be for the sessions alone. [*202]

We have here a company sole occupiers of a line of which they are owners. Of this the land in respect of which they are rated forms a part.

(a) As to the seventh and eighth heads, see pp. 194, 195, ante.

(b) *Regina v. The London and South Western Railway Company*, 1 Q. B. 558.

(c) *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18.

They are also sole occupiers, as lessees, of two branch lines, both issuing out of the line first named. Upon all these lines they carry on exclusively a large trade as carriers, the net receipts of which from the branch lines alone, if set against their expenses and rent, would make the occupation of them in fact a losing concern; but this occupation increases the traffic upon the main line; and for the sake of this the company are content to sustain that partial loss. In order to ascertain the rate, the course pursued has been to take the gross receipts per mile in the respondent parish; and this sum is not in dispute. The deductions to be made from this are calculated on a mileage proportion of all the expenses and outgoings, taking the whole three lines as one entire line in all particulars in which the appellants are at all chargeable; and we do not understand this mode to be objected to. Setting the proportion of these per mile against the gross receipts per mile, the residue has been taken as the ratable value per mile.

We are then to see whether these deductions include all such as ought to be made on an ordinary occupation exclusive of trade, and also all such matters as are distinctly referable to the trade only, and do not enhance the value of the occupation. If so, the principle of the *rate is
 *203] right: whether sufficient in amount under each head has been allowed, it is not for us to determine.

Nine heads are first stated, which are intended to represent the annual expense of keeping in repair the way, stations and other buildings, the rates and taxes, other than the property tax, payable on them, the expenses of directing and carrying on the business, the government duty on passengers, and some incidental charges connected with the trade. Thus far the outgoings allowed for are annual.

The appellants here first object that, beside an allowance for the merely annual repairs, they are entitled to one in respect of the depreciation and wear and tear of the rails and sleepers, the solid timber and iron work of their own principal line; and this, although hitherto they have not charged such expense against their income, but defrayed it out of their capital. In the case of *The Grand Junction Railway*, 4 Q. B. 18, such an allowance was conceded: it is now disputed: and the circumstances must therefore be examined. In themselves, perhaps, repairs of the kind now under consideration are not to be distinguished in principle from what the case denominates maintenance of the way, and which the appellants include under their annual expenses; and, although not called for in any particular year, yet, if, in the certainty that the charge would, in a given time, accrue, a proportionate sum had been actually deducted from the annual revenue to meet it, we see no reason why an allowance should not be made for it as much as for annual repairs actually done in the course of the year. But,
 *204] as, in the case of these last, the fact of repairs being needed would not entitle to a deduction unless they were done and the charge incurred, so, in the present case, as no deduction has been made from the revenue, it appears to us that no allowance can be made. For their own

purposes, and, as suggested in the argument, in violation of their act of parliament, the company have chosen to defray the amount, trifling probably at present, out of their capital, so that they have given that which they now seek to consider as tenants' repairs the character of landlord's improvements, the capital expended for which will swell the ratable value of land, but not be allowed in the rate.

The appellants next claimed to deduct the ratable value of the buildings appurtenant to their own line, and also to the branch lines respectively, and rated and ratable elsewhere than in the respondent parish, separately from the railway itself. This also is an allowance which was conceded in the case last referred to; for it would be hardly worth while to distinguish between those rated and ratable only; and we have no means of drawing the distinction in fact. It is to be remembered that the respondents properly treat the whole line, the whole profits, the whole outgoings, as entire; and then the question is whether there is any distinction between this and other outgoings necessary to the earning the profits by which the ratable value of the land in the respondent parish is enhanced. It seems to us there is none; and, if so, we agree with the learned counsel for the appellants that in principle it is indifferent whether the station be in the same parish or at a distance.

The appellants claim, thirdly, an allowance for 21,000*l.* yearly interest on the sum expended in forming *their company, obtaining their act of parliament, raising their capital, and other original expenses. [*205 For this there is no foundation. These expenses have no connection with the ratable value of the railway. They might have all been incurred and no railway ever constructed. As well might the purchaser of an estate with borrowed money, and after an expensive litigation as to the title, claim to deduct his interest and expenses from the poor rate on the land when in his occupation. They neither add to the value of the occupation nor are any way necessary to the making it up.

The appellants then claim to be allowed in respect of 10,000*l.* paid by them as income tax under stat. 5 & 6 Vict. c. 35. This claim is very shortly and unsatisfactorily stated. In respect of what the payment has been made we are not informed on either side: the argument respecting it was short. The respondents treated the claim as made in respect of the charge on the property in land payable by the owner: the appellants claimed it in respect of the charge on the occupation payable by the tenant: and to this extent at least it does not strike us that there is any reasonable distinction between this and any other outgoing chargeable on the tenant, which would certainly affect the amount of the rent he would be willing to pay.

The fifth claim is to be allowed for such additional parochial assessments as may become payable, it is not said when or where, in consequence of the recent decisions of this court; upon which we will only say that we

think the court would have been well justified in refusing to permit it to form part of the case.

In the sixth place, the appellants claim to be allowed a deduction in respect of their loss on the two branch *lines before referred to. We
 *206] think this cannot be allowed. If the rate in question had been imposed on land forming any part of the branch lines themselves, it is clear that the circumstance of the receipts not equalling the rent,—in other words that the line was worked at a loss,—could not have affected the rate: the occupation would have still been beneficial in the sense in which that word is used for the purpose of assessing the rate; and the rent which, from whatever motive, the appellants found it worth their while to give would have regulated the amount. This is not that case in the way in which it is sought to make this expenditure bear upon the rates assessed on any part of the main line; it is more like money laid out in the way of improvement, for which no deduction should be made. If the lessee of a coal mine were to open roads through adjoining lands rented under a separate demise, in order to facilitate the access of customers to the mine, and so increase its profits, the expense of such roads would certainly not be an outgoing to be allowed for by the overseers.

Two more questions are stated; the first as to the mode of ascertaining the tenants' profits in order to their deduction from the ratable value. The respondents have taken the original value of the plant or movable stock, and allowed ten per cent. upon it for these profits as well as the profits of trade. The appellants say that the more correct mode would be to ascertain them by a percentage on the gross receipts, and claim to have fifteen per cent. deducted from these on that account. We are very unwilling to withhold our aid in settling questions for the sessions of such novelty and
 *207] difficulty as the railway rating must often bring before *them; but we ought not to go beyond our province, and so perhaps mislead them. This question involves no principle of law; and we decline to answer it.

The last is only raised by the respondents provisionally in case any of the deductions claimed by the company should be allowed by us; but this has been done. In ascertaining the tenants' profits they have calculated the percentage on the original value of the movable stock; but the sessions have found that, at the time of the rate being made, the value had become less by 80,000*l.*, and the respondents contend that the percentage should properly be made on the smaller sum. This seems to us correct: they are to make the rate from year to year, or for whatever shorter period, conformably to the facts as they exist at the time of making it. They may not know, nor have any means of knowing, what the value was originally or in any former year. If, at the end of five or ten years, they are to be driven back to the original value, they may be equally required to ascertain it after an interval of a century. No hardship is inflicted on the appellants by this;

they may, and they ought, as prudent owners, to keep up the stock at its original value; and in this very case they have claimed a deduction for doing so. If that claim were properly made, the original and the present value would be the same. Although, however, we thus answer this question in favour of the respondents, they cannot avail themselves of the decision so as to increase their assessment beyond its present amount.

The consequence of the several decisions we have come to will be the amendment of the rate in one or *two particulars: but, as the sums are ascertained by the sessions, this may be done, we presume, by [*208 the counsel, without remitting the case again to the sessions.

Rate to be amended.

DOE on the demise of GEORGE WYNDHAM, Earl of EGREMONT;
v. MARY STEPHENS.

Lands were devised for life, remainder over, with power to the tenant for life to lease, "in possession or reversion, for one life or for two or three lives, or for any term or number of years determinable upon one life or two or three lives, any part of the said premises usually so leased;" "so that there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained, or more; and so that, in every of the leases so to be made and granted by virtue of the several powers aforesaid, there be contained the usual and reasonable covenants;" "and so as no clause or clauses be contained in any of the said leases giving power to any lessee to commit waste, or exempting him, her, or them from punishment for committing the same."

1. *Held*, that a lease by the tenant for life comprehending, at a single rent, as well some of the lands devised, as others not devised and not previously let with those devised, was bad as to the lands devised, although the rent reserved, with the heriots, &c., was in proportion to the rents, &c., previously reserved on all respectively.
2. But that, against a party claiming as heir of the lessor, the lease was good as to the lands not devised.
3. That, if the lease had comprehended only lands devised, it would not have been avoided by proof that the lands included in the lease had never before been let by a single demise; it also appearing that the rents, &c., reserved were in proportion to the rents, &c., formerly reserved.
4. That the lease was not avoided by its containing a stipulation that the lessee should build a new dwelling house, and might pull down an outhouse and use the materials for so building; no other facts being proved to show that this would amount to waste.
5. A., parcel of the lands devised, and leased by the tenant for life, had previously been demised by a lease containing a stipulation that the lessee should do suit by grinding at a certain mill; but a later lease of A., which was granted by the testator and running when the will was made, contained no such clause. *Held*, that a lease by a tenant for life was not bad for not containing such a clause.
6. C., also parcel of the lands devised, and leased by the tenant for life, had previously been leased by a deed which contained the same stipulation immediately after the *reddendum*. The lease following this, which was granted by the testator, and running at the time of making the will, was lost. *Held*, (the court having power to find facts on a special case stating as above,) that it was to be inferred that such a stipulation was a usual and reasonable covenant. And this, whether evidence (which was offered) were or were not admissible that the testator had frequently leased other parcels of the manor which included A. and C., omitting the stipulation in all such leases, though the previous leases of those other parcels contained it.
7. *Held*, that a lease of C. by the tenant for life which did not contain the stipulation was therefore void.

EJECTMENT for messuages, tenements, gardens, lands, and premises, situate in the parish of St. Decuman's in Somersetshire, being the premises

*209] expressed *to be demised in the indenture of lease marked A, hereinafter mentioned, parts of four several tenements formerly known by the several names of Andrew's or Stanley's Tenement, Stone's Tenement, Crang's Tenement, and Grayborough, parcel of Wakefield's.

The demise, from George Wyndham, Earl of Egremont, was dated 1st October, 1838.

On the trial, before ROLFE, B., at the Somersetshire Spring assizes, 1840, a verdict was found for the plaintiff in respect of Stanley's Tenement and Crang's Tenement; and the defendant claimed to have the verdict entered for her as to the other two tenements, Stone's and Grayborough, parcel of Wakefield's; subject to the opinion of this court on a case substantially as follows.

Charles, Earl of Egremont, before and at the date of his will, bearing date 31st July, 1761, and from thence to the time of his death, was seised in his demesne as of fee of the premises mentioned in the declaration: and, being so seised, by his will bearing date, &c., devised all his manors, messuages, lands, advowsons, rents, and hereditaments, parts and shares of manors, messuages, &c., (including the manor of Williton Regis, hereinafter mentioned,) in the several counties of Somerset, Dorset, and Cornwall, with their respective rights, members and appurtenances, part of the estate of his father Sir William Wyndham, Bart., deceased, unto his eldest son George Lord Cockermouth, and his assigns, for life, without impeachment of waste; remainder over, which failed before the death of George Lord Cockermouth; remainders to the fourth, fifth, and all and every other the son and sons of the said testator's body lawfully begotten, &c., and to the
 *210] respective heirs male of the *body of such son and sons lawfully issuing. The will contained the following power.

“And I do hereby further will and declare that it shall and may be lawful to and for the several and respective persons to whom any estate for life is hereinbefore devised, when and as they respectively shall be in the actual possession of the said manors, messuages, lands, tenements, and hereditaments, parts and shares of manors, messuages, lands, tenements, hereditaments, and premises, hereinbefore devised to them respectively, for their respective lives, as aforesaid, or any part thereof, by virtue of the limitations hereinbefore contained, by indenture or indentures under their respective hands and seals, to demise, lease, and grant all or any of the manors, messuages, lands, tenements, and hereditaments, parts and shares,” &c., “hereinbefore mentioned to be hereby devised or limited, to any person or persons for any term or number of years not exceeding twenty-one years, to take effect in possession and not in reversion or by way of future interest, so as in every such lease or demise there be reserved to continue, payable half-yearly or oftener during the term thereby to be granted, and be incident and go along with the reversion or remainder of the same premises expectant thereon, the best and most improved yearly rent and rents that can, at the time of making such leases, reasonably be got for the same, without

taking for the making of any such lease or leases any fine, premium or foregift; and also to demise, lease, and grant, in possession or reversion, for one life or for two or three lives, or for any term or number of years determinable upon one life or two or three lives, any part of the said premises usually so leased, so that all the leases to be made by virtue hereof, [*211 *which shall be in force at the same time, shall be determinable on the dropping of one life, or the dropping of two or three lives at the most; and so that there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained, or more; and so that, in every of the leases so to be made and granted by virtue of the several powers aforesaid, there be contained the usual and reasonable covenants, and a condition of re-entry for non-payment of the rent or rents thereby respectively to be reserved, in case the rent or rents be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained; and so as no clause or clauses be contained in any of the said leases giving power to any lessee to commit waste, or exempting him, her, or them from punishment for committing the same; and so as the respective lessees do execute counterparts of all such leases.”

The said Charles, Earl of Egremont, died, on the 21st August, 1763, without having revoked or altered his said will, leaving four sons born in lawful wedlock; namely, George O'Brien, his eldest son, in the said will called George, Lord Cockermouth, who succeeded his father as Earl of Egremont; and two other sons, who died before George O'Brien, without having had issue, as was more particularly stated in the case. William Frederick Wyndham, the fourth son, died on 18th February, 1828, leaving the lessor of the plaintiff, his eldest son and heir at law, him surviving. George O'Brien, Earl of Egremont, died on 11th November, 1837, without having ever had issue.

On the death of the testator, the said George O'Brien, Earl of Egremont, entered into the possession and receipt *of the rents of the said manors, &c., so devised as aforesaid, as tenant for life [*212 under the will; and, being such tenant for life, executed an indenture of lease, bearing date 29th September, 1828, between the said George O'Brien, Earl of Egremont, of the one part, and Mary Stephens of the other part.

A copy of this lease was annexed to the case, marked A.(a) [The lease was for ninety years, if three persons named, or either of them, should so long live. The material parts of the lease appear in the body of the case, except the following. By the statement of the consideration for making the lease, it appeared that the same was made in consideration of the surrender of a former lease, of certain money paid, “and also in consideration of the said lessee’s undertaking forthwith effectually to repair the present dwelling

(a) The parts included between brackets, in the text, were not in the stated case, but have been abstracted from the leases annexed.

house, and to build another respectable dwelling house on some convenient part of the premises hereinafter mentioned, called Crang's, (and which the said lessee doth hereby covenant to do accordingly.") And afterwards, in the description of the parcels, were the words following. "And also all that other messuage or dwelling house in Williton aforesaid, commonly called or known by the name of Crang's, with the outbuildings, barton and gardens thereto adjoining and belonging, containing, by estimation, half an acre, (part of which premises have for many years past been used as a tallow-chandler's shop; and which outbuildings the said lessee is at liberty to take down, or such part thereof as she may think proper, and the materials to be used in the house to be erected as aforesaid.") And, in a later part

*213] of the lease, was a covenant that the lessee, her executors, &c., "shall and will repair and keep in sufficient and proper repair, at all times, all and singular the premises hereby demised, in every respect whatsoever, and so leave and surrender up the same at the end of the said term, and shall not do, permit or suffer to be done, any waste, dilapidation, or damage on the said premises." This lease contained no clause as to grinding at Orchard Mills, after mentioned.] A counterpart thereof was duly executed by the said Mary Stephens.

The following are the particulars of the objections to the above lease, delivered under a judge's order.

1. That the terms and provisions of the power of leasing contained in the will of Charles, Earl of Egremont, were not pursued in making the said lease, and that the same was and is void against the remainder man.

2. That the premises therein comprised were not, before the creation of the said power, usually so leased; but that the same premises, or some parts thereof, were usually leased with certain other premises not comprised in the said indenture of lease, and were usually theretofore leased by separate and distinct leases.

3. That the ancient rents and heriots were not reserved in the said lease.

4. That the said lease gives liberty to the lessee to commit waste in and upon the said premises, and exempts her from punishment for committing the same.

5. That the said lease omits the following usual and reasonable covenant: "That the lessee shall do suit to the said mills, called Orchard Mills, by grinding at the said mills all such her and their corn, grain, and malt as during the term shall be expended upon the premises, it being intended and meant that the miller there for the time being shall not take excessive toll."

*214] The premises comprised in the said lease consisted of parcels of the before mentioned four separate tenements, known and hereinafter referred to by the following names, viz. Andrew's or Stanley's Tenement, Stone's Tenement, Crang's Tenement, and Grayborough, parcel of Wakefield's.

Andrew's or Stanley's Tenement and Crang's Tenement were established at the trial to have been part of the estate of Sir W. Wyndham, the deceased

father of the testator, and to have passed by the above mentioned devise ; but Stone's Tenement and Grayborough were not established to have been so, or to have so passed.

Before the said lease of the 29th September, 1828, the said four tenements had been usually let separately, and had never before been let together.

The lease of Andrew's or Stanley's Tenement, in existence at the time of making the will of Charles, Earl of Egremont, and of his death, and which was also the last lease granted previously to the making of the said will, bears date the 28th of May, 1744. A copy of this lease was annexed to the case, marked B. [It contained no clause respecting the grinding of corn at Orchard Mills.] The cestui que vies mentioned in the last mentioned lease were all dead before the year 1828. Andrew's or Stanley's Tenement had been before demised by the ancestors of Charles, Earl of Egremont, by several leases, bearing date the 4th October, 1667, and the 6th September, 1716. Copies of these leases were annexed to the case. Andrew's or Stanley's Tenement in the year 1716 comprised a messuage and tenement containing about ten acres of land. The lease of 28th May, 1744, comprised a part only of that tenement. And the lease of 29th September, 1828, comprised a *part only of that comprised in the lease of 28th May, 1744. The leases of 1667 and 1716 contained [*215 a reservation for the tenant's doing suit at Orchard Mills by grinding his corn, grain, and malt expended on the premises there. These mills formed part of the estate of the said Sir W. Wyndham, and passed by the above-mentioned devise in the said will of Charles, Earl of Egremont.

The predecessors in estate of Charles, Earl of Egremont, granted a lease of Crang's Tenement, dated 4th October, 1700, which lease was not determined at the time of the making of the will of Charles, Earl of Egremont, and of his death. A copy of this lease was annexed to the case. [It was by deed, and contained, in the reddendum, the clause following. "And also doing suit to the mills called Orchard Mills, by grinding at the said mills all such his and their corn, grain and malt, as during the term aforesaid shall be expended on the premises : and it is hereby intended and meant that the miller there for the time being shall not take excessive toll."] Another lease of Crang's Tenement for ninety-nine years, determinable on three lives, was granted by the testator, dated 25th March, 1757, in reversion of the lease of 4th October, 1700, of the same premises. The cestui que vies mentioned in the lease of 1757 were dead before the year 1828. The original lease of 1757 has been lost ; but it is referred to in a subsequent lease of the same property, dated 1st March, 1767 ; a copy of which was annexed to the case.

The next preceding lease of Wakefield's was dated 10th July, 1750 ; and the next preceding lease of Stone's was dated 10th May, 1750. Both of them were granted *by Charles, Earl of Egremont ; and neither [*216 of them contained any clause for doing suit at the mill.

The rent and heriots reserved in the lease to the defendant of 29th Sep-

tember, 1828, are in fair proportion in point of value to the rents and heriots which had formerly been reserved in respect of all the four tenements.

The following evidence, given by the defendant, was objected to by the counsel for the plaintiff, and was admitted, subject to the opinion of this court as to its admissibility.

Sir W. Wyndham, the father and immediate predecessor of Earl Charles, held several tenements within the manor of Williton Regis, (within which the premises in question are situate,) similar to Stanley's and Crang's tenements. Sir William and his guardians (during his minority) granted thirty-one leases (all being for years determinable on lives) of such premises; that is to say, the guardians granted five, and Sir William himself twenty-six, of the said leases.

The five granted by the guardians all contain a reservation of suit of mill in the following words and form. "1. And also doing suit to the mills of the said Sir William Wyndham, his heirs and assigns, called Orchard Mills, by grinding at the same mills all such corn, grain, and malt as, during the term aforesaid, shall be expended on the premises. And it is hereby intended and meant that the miller there for the time being shall not take excessive toll."

One of the same five leases also contains the following clause. "2. And shall and will well and truly yield, pay, do, and perform all and every the rents, heriots, *sum and sums of money for heriots, and other reser-
 *217] vations, suits, and services, before in these presents mentioned, in such manner and form as they are limited to be paid and performed; and also all such other rents, customs, suits, and services that have been heretofore of right done, paid, or performed, for or in respect of the premises or any part thereof."

Another contains the same clause, omitting the word "heriots" after the word "rents."

And the three remaining leases contain the following clause. "3. And shall and will also yield, pay, do, and perform all and every the rents, heriots, sum and sums of money for heriots, and other reservations, suits, and services, before in these presents contained or mentioned, in such manner and form as they are limited to be paid and performed, and also all such reasonable fines, pains, and amerciaments as during the term aforesaid shall be imposed, assessed, or incurred at any the said court or courts on him the said Peter Luckwell the elder, his executors, administrators, or assigns, or any of them, either for default of suit of court, or for not grinding at the said mills, or for not repairing the said premises or any part thereof, or for any other reasonable cause whatsoever.

Of the twenty-six leases granted by Sir William Wyndham himself, in fourteen thereof he omitted the clause, No. 1, and continued it in the remaining twelve leases. In five of the leases, he also omitted the clauses Nos. 2 and 3, and continued the clause No. 2 only in the remaining twenty-

one leases, with the exception of the word "heriots" after the word "rents," in ten of those leases.

In none of the thirty-one leases granted by Sir *William Wyndham and his guardians was there any formal covenant to do suit at the mill, independently of the above clauses. [*218]

The Earl Charles not only continued the omissions of suit of mill made by his predecessors, but also, in the seventeen instances where they had preserved the reservation of that suit, upon regranteeing the premises demised thereby he altogether omitted the reservation in sixteen of the leases; and the seventeenth is the lease of Crang's Tenement, which has been lost.

The court, at the request of either party, was to turn the facts into a special verdict, and was to be at liberty to draw any inference from the facts which a jury might have done.

If the court should be of opinion that the plaintiff was entitled to recover, on the demise in the declaration, the said tenements called Stanley's Tenement and Crang's Tenement, or either of them, or any part thereof, the verdict entered for the plaintiff was to stand. If the court should be of opinion that the plaintiff was not entitled to recover the said tenements, or any part of them, then the verdict was to be entered for the defendant.

The further question for the court was, whether the defendant was entitled to have a verdict entered for her in respect of Stone's Tenement and Grayborough; if so, the verdict was to be entered accordingly.

The case was argued in last Hilary term.(a)

Erle for the plaintiff. The first objection to the lease of 1828 is explained by the four following objections. *As the facts are found, the objections do not apply to Stone's Tenement or Grayborough: the plaintiff therefore claims only Andrew's (or Stanley's) Tenement, and Crang's Tenement. [*219]

As to the second objection. The words of the power as to leases for life or lives authorize the letting only of "any part of the said premises usually so leased." The subject of this lease has never before been so leased: the several parcels of which it consists have been let in distinct leases; and some of these parcels are no "part of the said premises" at all. That this avoids the lease, appears from the language of the court in *Doe dem. Douglas v. Lock*, 2 A. & E. 705, 747, and from the decisions in *Doe dem. Vaughan v. Meyler*, 2 M. & S. 276, and *Doe dem. Bartlett v. Rendle*, 3 M. & S. 99. In *Doe dem. Williams v. Matthews*, 5 B. & Ad. 298, a tenant for life, having power to lease certain lands on the rents formerly reserved, made a lease of those and other lands which had been excepted from the power, at a single rent; and it was held that the rent could not be apportioned, and that the lease was void as to the whole. "Strictness on this head has been carried so far, that it has been considered that two several farms not usually let together, could not be joined in one demise with a reservation of one

(a) January 23d and 26th, 1844. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, J.

and the same rent; nor a parcel of a farm rendering rent *pro rata*;" 2 Sugd. Pow. 409, (7th ed.) For this *Lord Mountjoy's Case*, 5 Rep. 3 b, 5 b, is referred to: and it is true that this case has been overruled in *Doe dem. Earl of Shrewsbury v. Wilson*, 5 B. & Ald. 363, so far as relates *220] to "the division of property all of which is within the power. But the annexation of land not within the power, and letting the whole at a single rent, has never been sanctioned. Stat. 39 & 40 G. 3, c. 41, s. 1, authorizes the division of tenements, though not the uniting, in leases by ecclesiastical bodies: but the inference from this is rather against the right, under a power, and independently of statute, to divide tenements before joined, or to join those before demised separately. In *Orby v. Mohun*, 2 Vern. 531, 542, it seems to have been admitted that, under a power like this, lands not usually demised could not be joined in a lease with lands usually demised.

As to the third objection. No portion of the rent being specifically assigned to the particular portions demised, it cannot be said that the ancient rents are reserved.

As to the fourth objection. The power requires that "no clause or clauses be contained in any of the said leases giving power to any lessee to commit waste, or exempting him, her or them from punishment for committing the same." Now the lease permits the lessee to pull down the outhouses in Crang's Tenement. That is waste: and it makes no difference that the materials are to be employed in rebuilding a new house. It is waste either to pull down a house on a copyhold or to build a new one; Com. Dig., *Copyhold*, (M 3.) Even where the substitution of the new building for the old is an improvement, it is waste; *Cole v. Green*, 1 Lev. 309, note (11) to *Greene v. Cole*, 2 Wms. Saund. 259; (a) *City of London v. Greyme*, Cro. Ja. 182, 2 Rol. Abr. 815, *Wast.* pl. 18, 19. The amount of the *221] "deterioration might be a distinct question, as in *Doe dem. Earl of Darlington v. Bond*, 5 B. & C. 855. It is true that the lease contains a general covenant against waste: that, however, will not control the effect of the express permission.

As to the fifth objection. The "usual and reasonable covenants" are not contained in the lease of 1828. The test, as to what covenants are usual and reasonable, is the latest lease before the execution of the will. That was the lease of 1757, so far as Crang's Tenement is concerned. But, that lease being lost, the lease to be looked to is the latest prior lease which exists; and that is the lease of 1700, which contains the clause respecting the suit at Orchard Mills. As to Andrew's Tenement, the lease in existence at the time of making the will certainly did not contain the clause in question; that, however, may possibly have been because the tenements had been divided; the older leases of lands in the manor in which this property lies did contain the clause. But, if the court shall think that, as to Andrew's Tenement, the lease of that portion existing at the date of the

(a) See (o) *ib.* (6th edit.) *Simmons v. Norton*, 7 Bing. 640.

will might be followed, still the objection as to Crang's Tenement is fatal to the whole lease. The attempt on the other side will be to interpret the words "usual and reasonable" by the custom of the country, or the reservations usually made in leases of other property of the same owner. In *Doe dem. Douglas v. Lock*, 2 A. & E. 707, the power required that the leases should be made "so as the ancient and accustomed yearly rent and reservations be thereby reserved," and also "with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as are usually and customarily contained in leases of the same kind, in the several and respective parishes and *places where the same premises are situated." The court pointed out^(a) that this power contained [*222 two sets of provisions; and that, as to the second, the course and custom of covenants, &c., in leases of other property in the same places respectively must be looked at; but that the first provision must be satisfied independently of this, and it was only after ascertaining that the first provision was satisfied that inquiry was to be made with respect to the second. Here no reference is made to the covenants usual in leases of other property; and the rule of looking to the last existing lease must prevail, as in *Orby v Mohun*, 2 Vern. 531, 542.

Kelly, contra. None of the objections pointed to by the first objection can be maintained.

The second objection is not raised by the facts of the case. The words "so leased" refer, not to the uniting or severing of tenements, but to the manner of leasing, that is, "in possession or reversion," &c. The fifth resolution in *Lord Mountjoy's Case*, 5 Rep. 5 b, is overruled expressly in *Doe dem. Earl of Shrewsbury v. Wilson*, 5 B. & Ald. 363, which cannot be distinguished from the case now before the court, since it can no more be a violation of a power to unite tenements formerly divided than to divide tenements formerly united: the latter, indeed, would appear to be the more objectionable proceeding, since it limits the power of distress, whereas the former enlarges it by enabling the landlord to distrain on any part of the whole premises demised if any portion of the rent be in arrear.

*As to the third objection, it is argued, as in *Lord Mountjoy's Case*, 5 Rep. 3 b, 6 a, that the usual rents cannot be said to be re- [*223 served. But the finding here meets the objection; for it is said that the proper proportion has been observed. In the passage in Sugden on Powers, vol. ii. p. 409, 7th edit., the author treats the question respecting ecclesiastical leases as having been doubtful before stat. 39 & 40 G. 3, c. 41. It may also be observed that in *Lord Mountjoy's Case*, 5 Rep. 6 a, much stress was laid on the tenure being copyhold, which is not the case here. In *Smith v. Bole*, Cro. Ja. 458, an ecclesiastical lease was held to be void, because it did not except the trees, as the former leases did, so that more was let than before: but the reason given shows that the decision is inapplicable here; for it was said that the rent was not the ancient rent; and, in fact,

(a) 2 A. & E. 734, 735.

the same sum of money, 17*l.*, was reserved as before; that is, more was let but not more paid. Here the proportion is preserved. *Doe dem. Bartlett v. Rendle*, 3 M. & S. 99, appears to lay down merely the doctrine in *Lord Mountjoy's Case*, 5 Rep. 3 b, 6 a, and, so far, to be overruled by *Doe dem. Earl of Shrewsbury v. Wilson*, 5 B. & Ald. 363.

As to the fourth objection, there is not a permission to commit waste. It does not appear that the premises will be deteriorated: indeed the contrary is presumable. The case not finding deterioration, either by injury to the property or destruction of evidence of title, there is no waste; *Doe dem. Grubb v. the Earl of Burlington*, 5 B. & Ad. 507.

*224] As to the fifth objection, the clause respecting *suit to the mill in the old leases is not a covenant at all: it is a reservation; *Doe dem. Douglas v. Lock*, 2 A. & E. 705, 743. The reservation did not exist in the last lease of Andrew's Tenement; nor is it shown to have existed in the lease of Crang's Tenement last preceding the will; and in most of the leases made by the creator of the power there was no such reservation.

Erle in reply. As to the second and third objections. In Co. Lit. 44 b, Lord Coke, speaking of stat. 32 H. 8, c. 28, s. 2, says: "If twenty acres of land have been accustomably letten, and a lease is made of those twenty, and of one acre which was not accustomably letten, reserving the accustomable yearly rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the act, for that the accustomable rent is not reserved, seeing part was not accustomably letten, and the rent issueth out of the whole." The difficulty becomes greater when, as here, there are reservations of heriots, which cannot be subdivided or apportioned.

As to the fourth objection, *Doe dem. Grubb v. The Earl of Burlington*, 5 B. & Ad. 507, is relied upon on the other side. But there the waste was negatived. *Prima facie*, as was there laid down, the alteration of a building is waste. The lessee might pull down a barn, and die before the new building was begun.

As to the fifth objection, the reservation, occurring in a deed, is a covenant in law. *Cur. adv. vult.*

*225] *Lord DENMAN, C. J., in this term, (May 27th,) delivered the judgment of the court.

The question in this case was the validity of a lease for ninety-nine years, determinable on three lives, granted by the late Earl of Egremont to Mary Stephens, on the 29th September, 1828.

The lease comprised four tenements: 1st. Andrew's or Stanley's, 2d. Stone's, 3d. Crang's, 4th. Grayborough, parcel of Wakefield's.

Lord Egremont was tenant for life under the will of his father, dated July, 1761, of certain estates, part of the estate of the late Sir William Wyndham, and had power to demise for years, determinable on one, two or three lives, *any part of* the premises *usually so leased*, by lease reserving the ancient and accustomed rents and heriots, and containing *the usual and reasonable covenants*, and not containing any clause giving power to the

lessee to commit waste or exempting him from punishment for committing the same. It appears by the case that the tenements called Andrew's and Crang's were part of the estate of Sir William Wyndham : but Stone's and Grayborough were not shown to have been so. Those two must therefore be taken not to be within the power ; and, as to them, the plaintiff must fail, because, upon the facts stated in this case, it does not appear what estate the late Lord Egremont had in them at the date of the lease in question ; and, as the present lessor of the plaintiff could only claim them as heir at law to the late lord, he would by that very claim show the late lord to have been seised in fee, and of course to have been able to demise them in any way he thought fit.

*Four objections were made to the lease.(a)

1. That it comprises tenements within the power and others not [*226 within it, and therefore, that the power is not well executed.

2. That, even if all the tenements had been within the power, they had always been leased separately, and, therefore, had not been "usually so leased" as now, within the meaning of the power.

3. That the lease gives power to the lessee to commit waste.

4. That it does not contain the usual and reasonable covenants, for it omits a covenant to grind at the lord's mill.

The first objection appears to us to be very formidable. It is not merely that tenements not before letten together had been joined at an entire rent, or that premises had been severed and divided which were before letten together at pro rata rents, where all were parcel of the same estate, and under the same power. But it is mixing and joining, at an entire rent, premises under the power and others to which the power does not extend. It is true that the case finds that the rents and heriots reserved are in fair proportion, in point of value, to the rents and heriots which had been formerly reserved in respect of all the four tenements ; but that finding could only assist in respect to the second objection, and indeed is not very consistent with the supposition that two out of the four tenements are not within the power at all. The authorities cited, especially *The Earl of Cardigan v. Montagu* in the Appendix *to Sugden on Powers, No. 13, vol. ii.

p. 551, 7th edit., *Doe dem. Bartlett v. Rendle*, 3 M. & S. 99, and [*227 others which are commented on in *Doe dem. Douglas v. Lock*, 2 A. & E. 747, establish the position that the mere joining of strange tenements at an entire rent is fatal to the lease. And, if the tenements called Stone's and Grayborough are taken to have been held in fee-simple by the late lord, there would be no ancient and accustomed rent as to them ; and it is difficult to see how the small rent(b) reserved by the lease in question could be apportioned.

To the second objection it was answered in argument that tenements

(a) The objections, as numbered in the judgment, do not correspond with the numbering in the case and argument.

(b) Fourteen shillings yearly, exclusive of the sum paid on the renewal, and of the heriots.

which are all under a power may be joined and separated *ad libitum*, provided the due proportion of rent be reserved: and the case of *Doe dem. Earl of Shrewsbury v. Wilson*, 5 B. & Ald. 363, was relied on. We are inclined to think that the answer is sufficient: and we are of opinion that the words "usually so leased," on which that objection was much founded, relate to the time and duration of the lease, not to the joining or separating the premises.

We think there is nothing in the third objection. Whether the taking down the outhouse and using the materials to build a house would or would not be waste, if not authorized to be done by the reversioner, we are of opinion that the contract and permission so to do is not a clause giving power to the lessee to commit waste within the meaning of the leasing power in question.

The fourth objection depends upon this, what are the *usual and reasonable covenants* contemplated by the "power? Now the general rule
 *228] is to take as a guide the lease in existence at the time of the creation of the power. In this case, as far as regards Andrew's Tenement, that lease was dated in 1744, the power being created in 1761, by the then Lord Egremont, who had himself granted the lease of 1744, by his then name of Sir Charles Wyndham. It is silent as to suit at the mills: and, although the prior leases contain a reservation of that suit, yet the lease of 1744 did not comprise all the tenements which those prior leases did, and, being granted by the person who created the power, we think well warranted the omission of suit to the mills in the lease of 1828. As to Crang's Tenement the case is different. There were two leases of it in existence at the time of the creation of the power, viz., the lease of 1700 and that of 1757: the latter is lost; and the contents are unknown, though it is stated as existing in a lease of 1767, which was after the creation of the power and the death of the Lord Egremont who created it. The lease of 1700 does contain a reservation of suit at the mills, and a covenant to perform the suit so reserved. We think it impossible, therefore, to say that such covenant was not one of the usual and reasonable covenants: and then the omission of it in the lease of 1828 is fatal to the whole lease. This decision is wholly independent of the question, whether the evidence of the thirty-one leases was receivable or not. It would have been the same if they had not been received.

Upon the whole, therefore, as well on the first objection as the fourth, we think the lessor of the plaintiff entitled to the judgment of the court.

Judgment for plaintiff.(a)

(a) See the next case.

*DOE on the several demises of GEORGE WYNNDHAM, Earl of EGREMONT, and NEIL BENJAMIN EDMONSTONE, v. WILLIAM BURROUGH, senior, and WILLIAM BURROUGH, junior. [*229]

Power, under a will, to tenant for life to grant leases, so that in every such lease there be contained the usual and reasonable covenants, and "a condition of re-entry for non-payment of the rent or rents thereby respectively to be reserved, in case the rent or rents be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained."

Lease, with a covenant to repair, and proviso for re-entry if the tenant should suffer the premises to be out of repair, and should not repair the same "*within six calendar months next after notice.*"

Held, void, as a bad execution of the power.

EJECTMENT for lands in Devonshire. On the trial, before CRESSWELL, J., at the Devonshire Summer assizes, 1842, a verdict was found for the plaintiff, subject to the opinion of this court upon a special case, the material parts of which were as follows.

Charles, Earl of Egremont, before and at the date of his will, bearing date 31st July, 1761, and from thence to the time of his death, was seised in his demesne as of fee of the premises mentioned in the declaration, and, being so seised, by his said will devised all his manors, lands, &c., and parts and shares of manors, lands, &c., in the county of Devon, of which the premises mentioned in the declaration were part, to his second son, Percy Charles Wyndham, and his assigns, for life, with remainders over.

The will contained a power to demise, in the same terms with the power set out in *Doe dem. Lord Egremont v. Stephens*, antè, p. 210, and containing this clause. "And so that there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained, or more, and so that in every of the leases, so to be made and granted by virtue of the several powers aforesaid, there be contained the usual and reasonable covenants, and a condition of re-entry for non-payment of the rent or rents thereby respectively to be reserved, in case the rent or rents be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained." [*230]

Percy Charles Wyndham, being such tenant for life, made and executed three several indentures of lease, each bearing date 16th August, 1796, and made between the said P. C. Wyndham of the one part, and William Guppy of the other part.

Copies of the leases were annexed to the case. Each lease (for ninety-nine years, determinable on certain lives) contained a covenant by Guppy, for himself, his executors, &c., to repair the demised premises, and maintain, uphold, &c., and a proviso for re-entry "if the said William Guppy, party hereto, his executors," &c., "shall suffer the said demised premises,

or any part thereof, in any manner to run to ruin or decay for want of the reparations," &c., "aforesaid, and shall not sufficiently repair," &c., "and amend the same within six calendar months next after notice shall be given by the said P. C. Wyndham and his assigns, or other persons successively entitled as aforesaid for the time being, their heirs or assigns, to the said W. Guppy, party hereto, his executors, administrators, or assigns, or tenant on the premises."

The leases of the premises comprised in the two first mentioned indentures, existing when the will was made, and which were the leases last granted before making the will, bore date in 1751, and were annexed to the case. They contained provisos avoiding the respective leases in case the tenant, his executors, &c., should permit and suffer the premises to be ruinous and in *decay for want of reparations, without any mention
 *231] of notice.

Some older leases of these premises respectively, (dates, 1674, 1674, 1706, 1713, 1713,) and one lease of the premises comprised in the third indenture, (date 1690,) were also annexed to the case, containing provisos of re-entry in case of waste to the value of 10s., (a) if not amended or compensation made within one, two, and three months (b) after notice, no sufficient distress being found.

Particulars of objections to the three first mentioned leases were delivered under a judge's order; and (so far as material to the present decision) were:—

That the terms and provisions of the power of leasing contained in the will of Charles, Lord Egremont, and under which will the said P. C. Wyndham, deceased, was, at the time of making the said alleged leases, tenant for life of the premises therein expressed to be demised, were not pursued in making the said leases, and that the same were and are void against the remainder man. "And the particular objections thereto are that the said several leases do not respectively contain conditions of re-entry for non-performance of the several covenants therein respectively contained, as required by the said power. That the said several leases respectively do not contain conditions of re-entry for non-payment of the rents in the same leases respectively contained in case the same be behind or unpaid by the
 *232] space of *twenty-one days, as required by the said power." That the leases omit usual and reasonable covenants, namely to do suit and service at the manor courts, &c. And that the leases give power to the lessee to commit waste, and exempt him from punishment for committing the same.

The question for the opinion of the court was, whether, under the above circumstances, the said leases of August 16th, 1796, or any or either of them, were or was void as not authorized by the power. If the court should

(a) The proviso in the three earlier leases was, in case of waste done or wilfully suffered; in the three later, of waste done or committed. The leases of 1713 made the proviso attach in case, &c., as above, and "if no sufficient distress" "can or may be found," &c.

(b) The leases of 1674 gave one month; that of 1690 three; the others two.

be of opinion the said leases or any or either of them were not authorized by the power, the verdict entered for the plaintiff was to stand for all or for part of the premises contained in the declaration, as the case might be. If otherwise, the verdict to be entered for the defendants. The case was argued in last Hilary term. (a)

Erle, for the plaintiff, contended that the leases varied materially from the terms of the power, inasmuch as they prevented the landlord from re-entering for breach of the covenant to repair till the expiration of a six months' notice; a restriction for which no precedent appeared in the former leases. (The argument on other points is rendered immaterial by the judgment of the court.)

Cockburn, contra. Powers of this kind have in late times been construed liberally, and with a reasonable regard to the intention; and on this principle of construction a majority of the judges, in *Smith v. Doe dem. v. Jersey*, 2 Brod. & B. 473, (b) decided that a power (c) to lease, "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved," was well executed by grant of a lease with proviso for re-entry if the rent should be behind, &c., by the space of fifteen days, and no sufficient distress to be found on the premises. The clause here introduced is a usual one in leases. The object contemplated by the power was, not to punish the tenant, but to secure the remainder man. It is enough if the proviso be one which insures performance of the covenant.

Erle in reply. The test, what is reasonable and usual, is decisive against these leases. The lessor could not turn an absolute covenant into a qualified one.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (May 28th,) delivered the judgment of the court.

We are of opinion that the lease in this case cannot be supported. The power requires that there should be a clause of re-entry for non-performance of the covenants to be contained in the lease. The lease contains a general covenant to repair and keep in repair: the clause of re-entry is in case the lessee shall not repair after six calendar months' notice. This appears to us to be clearly not a compliance with the power, and to entitle the lessor of the plaintiff to our judgment.

Judgment for plaintiff.

(a) January 26th, 1844. Before Lord Denman, C. J., Patteson, Coleridge, and T'rightman, J.

(b) In Dom. Proc., reversing the judgment of the Exchequer Chamber, in *Doe dem. Jersey v. Smith*, 1 Brod. & B. 97, and affirming that of the King's Bench in *Doe dem. Earl of Jersey v. Smith*, 5 M. & S. 467.

(c) See 1 Brod. & B. 101, 106.

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*WOOD and Others v. TASSELL.

Plaintiff bought of defendant, and paid for, hops which lay at the warehouse of F., having been placed there by a party who had sold them to defendant. After the sale, plaintiff was informed that the hops were at F.'s, had them weighed there, and took away part. Some days after, he applied for the residue; but they had been taken away in the mean time by a creditor of the first seller. Defendant had not given plaintiff a delivery order, nor had he demanded one.

Held, that F. had the residue of the hops in his possession, as agent to plaintiff, and that defendant was not liable to plaintiff for the non-delivery of them.

Therefore, plaintiff having brought *assumpsit* for the non-delivery, and defendant having pleaded that he did deliver: *Held*, a misdirection to leave it to the jury whether defendant ought to have given plaintiff a delivery order.

ASSUMPSIT. The first count alleged that heretofore, to wit on, &c., plaintiffs, at the request of defendant, bargained with defendant to buy of him, and defendant then sold to plaintiffs, twenty-six bags of hops at 6*l.* 17*s.* per cwt., and six bags one pocket of hops at 6*l.* 6*s.* per cwt., to be delivered by defendant to plaintiffs at their request, and to be paid for by plaintiffs to defendant on request: and, in consideration thereof, and that plaintiffs had then undertaken, &c., to accept and receive the hops, and to pay defendant for the same at the price aforesaid, defendant then promised plaintiffs to deliver the said hops to them as aforesaid. And, although plaintiffs afterwards, and in pursuance of the said bargain and sale, to wit on, &c., paid to defendant the said price for the said hops, amounting to, &c., to wit, 570*l.* 18*s.* 6*d.*, and although plaintiffs then, to wit on, &c., requested defendant to deliver to them the said hops according to defendant's said promise, and although plaintiffs were then, and at all times from the making of the said bargain and sale and promise hitherto, ready and willing to accept and receive the hops, and although defendant afterwards, to wit on, &c., delivered to plaintiffs a part, to wit twenty-six bags, of the said hops, and although a reasonable time from the making of the said promise for the delivery of the whole of the said hops had elapsed before the commencement of this suit, of all which, &c., (notice to defendant:)

*235] *yet defendant, not regarding, &c., did not nor would, when so requested, &c., or at any other time, &c., deliver the residue of the said hops, to wit the said six bags and one pocket of the said hops, or any part thereof, to plaintiffs, but wholly neglected, &c.: whereby defendants have lost, &c., divers great gains, &c.

Counts for money had and received, and on an account stated.

Pleas 1. Non assumpsit. Issue thereon.

2. To the first count, that defendant did, within a reasonable time from the making of the said promise for the delivery of the said hops, to wit on, &c., deliver to plaintiffs the said residue of the said hops in the declaration mentioned: conclusion to the country. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the London sittings after Michaelmas term, 1842, a verdict was found for the plaintiffs. In Hilary

term, 1843, *Erle* obtained a rule nisi for a new trial, on the ground (among others, which need not be specified) of misdirection. In last Hilary term, (a)

Kelly and *Butt* showed cause, and *Erle* supported the rule. The judgment contains all that requires to be noticed in the report.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (May 22d,) delivered the judgment of the court.

This action was brought for non-delivery of six bags of hops bargained and sold by the defendant to the plaintiffs, and paid for by them. The defence was that *they were delivered according to the contract, though the plaintiffs never received them. They were parcel of a [236 larger quantity, and lay at the warehouse of one Fridd, with whom they had been deposited by the former owner, who sold them to Tassell. After the sale to the plaintiffs was complete, the plaintiffs were informed that they were at Fridd's: they had them weighed there, sent to Fridd for part of them, and received that part. When they sent for the remainder, at the distance of several days, they were gone, a creditor of the earlier vendor having claimed the right to them and removed them.

We think it unnecessary to enter into a minute examination of authorities, (b) because, on the facts, it is clear that the plaintiffs knew that the hops were lying at Fridd's to their use, and might, by applying to Fridd, have obtained the remnant now in dispute, as they had the other part. The defendant had done all he was bound to do, and cannot be responsible for Fridd's wrongful delivery of them to another. This was the view which I took at the trial, though I was induced by some degree of importunity to leave it as a question to the jury whether the defendant ought to have given the plaintiffs a delivery order, though not expressly required, in performance of his contract. We all think that I was wrong in so submitting the matter to them, and that the correct course would have been to direct them that, under the circumstances, Fridd held the hops as agent for the plaintiffs.

Rule absolute.

(a) January 13th, 1844. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, J.

(b) The following were referred to in argument. *Dixon v. Yates*, 5 B. & Ad. 313; *Harman v. Anderson*, 2 Campb. 243; *Lucas v. Dorrien*, 7 Taun. 278; *Coe v. Clay*, 5 Bing. 440; *Hammond v. Anderson*, 1 New. Rep. 69; *Stonard v. Dunkin*, 2 Campb. 344.

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*SCOTT v. VAN SANDAU. June 6.

A verdict was taken at nisi prius for 3000*l*. damages, subject to the award of a barrister, to whom all matters in difference in the cause were referred, with power to decide on the admissibility of evidence as a judge at nisi prius might, and to reserve points of law for the decision of the court. And there was the usual power to proceed ex parte, if either of the parties should by affected delay prevent making the award, or should not attend after reasonable notice and without such excuse as the arbitrator should adjudge reasonable.

The arbitrator made a special statement of facts, affecting the admissibility of certain depositions in evidence, and awarded that the verdict should be reduced to 1358*l*. if the court should be of opinion that the depositions of A. and B. were admissible; to 1165*l*. if the court should think the depositions of A. only admissible; and to 579*l*. if the court should think neither of the depositions admissible. *Held*, that the award was final.

The arbitrator, having, in the course of the reference, (April 28th,) appointed a meeting for a certain day, (May 15th,) was informed by the defendant that he did not intend to be present, one of his reasons being that, on account of the non-admissibility of certain depositions which the arbitrator had not rejected as evidence, no award he could make would be valid; and another reason being that the notice was too short. The arbitrator, (having postponed the meeting for a day, of which he gave defendant notice, but without reference to defendant's communication,) proceeded ex parte.

Held, that he was warranted in so doing, though he had not warned the defendant that if he absented himself the arbitration would proceed ex parte.

AFTER the decision in *Scott v. Van Sandau*, 1 Q. B. 102, the arbitrator proceeded on the reference and made his award. In last Easter term cross rules were obtained: By the plaintiff, to show cause why the verdict should not be entered for him for 1358*l*. 11*s*. damages, or such other amount of damages as the court might think fit, pursuant to the award: By the defendant, to show cause why the award should not be set aside, on the grounds, (among others:) "That the cause is not decided by the arbitrator at all, and the award is not final: That the arbitrator finds evidence instead of facts, and the award is uncertain:" and "That the arbitrator improperly proceeded ex parte."

The order of nisi prius under which the arbitration took place directed as follows. "That the jury find a verdict for the plaintiff, damages 3000*l*. and costs 40*s*., subject to the award, order, arbitrament, final end, and determination" of a barrister, "to whom all matters in difference *238] in the said cause between the said parties are hereby referred, to order and determine what he shall think fit to be done by the said parties respecting the matters in dispute, so as the said arbitrator do make and publish his award," &c. And it was thereby ordered that the arbitrator "shall have the same power as a judge at nisi prius to decide as to the admissibility of evidence, and to reserve points of law for the decision of the court." And "that, if either of the said parties shall by affected delay or otherwise wilfully prevent the said arbitrator from making his award, or shall not attend after reasonable notice and without such excuse as the said arbitrator shall be satisfied with and adjudge to be reasonable, then the said arbitrator may proceed ex parte, and the party occasioning the delay shall pay to the other such costs as the said court" (of Queen's Bench) "shall think reasonable."

The award, after the formal introduction, proceeded as follows. "Now I" "do in the first place award that the said verdict do stand for the plaintiff on all the issues, and that the said damages be reduced to the sum of 1358*l.* 11*s.*, if the Court of Queen's Bench upon the facts hereinafter specially stated shall be of opinion that the depositions of Matthew Smellie, John Marshall, John Drummond, and Robert Ferguson, witnesses examined upon interrogatories under a certain commission to examine witnesses in Scotland,^(a) were admissible in evidence subject to objections to particular questions and answers therein. Secondly, if the court shall be of opinion that the depositions of M. Smellie were admissible although the depositions of J. Marshall, J. *Drummond, and R. Ferguson, were improperly admitted in evidence, or if the court shall be of opinion that the [239 facts specially stated with regard to the payment of a certain sum of 508*l.* 18*s.* 9*d.* were admissible, and sufficient, to prove the payment of such sum by the said plaintiff to the said M. Smellie, then I award that the said damages be reduced to the sum of 1165*l.* 1*s.* If the court shall be of opinion that no part of the said depositions of M. Smellie, J. Marshall, J. Drummond, and R. Ferguson ought to have been received in evidence, and that the facts stated with regard to the payment of the said sum of 508*l.* 18*s.* 9*d.* were not admissible, or not sufficient, to prove the said payment of that sum, then I award that the said damages be reduced to the sum of 579*l.* 19*s.* With regard to the admissibility of the depositions of M. Smellie, J. Marshall, J. Drummond, and R. Ferguson, I specially state as follows." He then set out the facts raising the above questions, without any further finding or intimation of his opinion respecting them; and proceeded, in conclusion, to award as to the costs of the cause, and of the reference and award, over which the order of reference gave him jurisdiction.

The following facts, among others, were stated on affidavit by the defendant.

After the above mentioned decision in *Scott v. Van Sandau*, 1 Q. B. 102, the plaintiff did not proceed till December, 1841. Meetings on the reference were afterwards held, and objections were made to the admissibility of the above depositions, some of which objections the arbitrator promised to reserve by his award, and others he *overruled. The last meeting [240 attended by the defendant was on February 8th, 1842, when the arbitrator rejected the depositions of Drummond, and the plaintiff's attorney submitted to that decision, and stated his intention of examining Drummond *vivâ voce* on a future day. Nothing further was done on the reference till February 3d, 1843, when the arbitrator gave an appointment for the 9th, which, however, was not insisted upon, the defendant objecting. On the 15th the arbitrator made a peremptory appointment for the 21st or 22d at defendant's option; but on the 22d defendant received a letter from plaintiff's attorney, stating that such appointment was postponed. On April

(a) See *Scott v. Van Sandau*, 1 Q. B. 102.

28th, defendant received from the arbitrator a peremptory appointment for proceeding with the reference on May 15th. On May 1st the defendant wrote to the arbitrator "respectfully informing him that it was not this deponent's" (the defendant's) "intention to attend that appointment, and stating that some of his reasons for such his determination were that, by reason of the non-admissibility of the said depositions, no award which the arbitrator could then make could be supported; and further that, in the absence of the aforesaid objections, this deponent would not have considered himself bound to attend the appointment by reason of its shortness; for, considering that the matter had been allowed to sleep for considerably more than twelve months, this deponent would be entitled to at least a term's notice, which notice would, as this deponent alleged, and as was the case, have been necessary, particularly having regard to this deponent's other pressing engagements, for his preparation: and at the same time this deponent respectfully suggested to the *said arbitrator that, if it *241] was considered that this deponent was not justified for such reasons in refusing to attend the appointment, it would be open for the plaintiff to apply to this court on the order of reference as for the costs of affected delay; in which case this deponent intimated he would justify his refusal to attend that meeting by urging his aforesaid objections: and this deponent made that suggestion that he might thus endeavour to take the opinion of the court on the validity of his aforesaid objections, and thus prevent larger abortive expense."

The defendant further stated in his affidavit that the arbitrator disregarded this letter; but that, on May 8th, defendant received from him another peremptory appointment, substituting the 16th for the 15th of May: that no intimation was then given to defendant, nor did he suppose, nor had he reason to believe, that the arbitrator intended proceeding *ex parte*; "but this deponent, who could not possibly have properly prepared himself for that meeting in the mean time, having regard to the bulk of the papers and the time which had been allowed to intervene since the last preceding meeting, did then suppose that the said arbitrator only intended formally to hold a meeting, in order to enable the plaintiff, according to this deponent's suggestion, to apply to the court for costs against this deponent as for affected delay, and thus to try the validity of this deponent's aforesaid objections, and particularly of his objections to the validity of the said depositions."

The meeting took place, and a witness was examined. Defendant did not attend, but sent a short-hand writer to take down the proceedings. Defendant afterwards wrote to the arbitrator, remonstrating against the course *pursued; but the arbitrator disregarded this, and held other meetings *242] *ex parte*, at which he received evidence in defendant's absence, "and without notice to this deponent" (the defendant) "that he intended to proceed *ex parte*." At these latter meetings no short-hand writer or other person attended for defendant. On 26th September, 1843, the arbitrator

wrote to defendant, informing him that the plaintiff had closed his case, and saying: "Although you have repudiated my authority to proceed in this reference, and treat me as *functus officio*, I deem it right to give you the above intimation, adding that, if you wish to be heard or to offer evidence in defence, I shall be happy to consult your convenience in fixing a time," &c. "I make this offer in consequence of your not having sent a short-hand writer to attend me at the last meeting. If you determine not to attend me for the purpose of making your defence, I shall proceed to make my award without delay." The defendant wrote in answer that, while ignorant of the oral testimony received in his absence, he could not judge if he ought to leave the arbitrator to make an award without any statement in defence, or if he should proceed to make his defence without prejudice to his objections against the arbitrator's course of proceeding, and under protest; he therefore requested a copy of the arbitrator's notes taken at the several *ex parte* meetings. The arbitrator stated in answer that he was willing to give defendant such copy; "but," he said, "I cannot at the same time allow you to treat me as *functus officio* for having proceeded *ex parte*. You either do appear at the meetings to which you allude, or you do not; but, if you take a copy of my notes of what took place at those meetings, I shall consider you *as having appeared at them:" and he stated that, if he gave defendant a copy of the notes, it was [243 for the purpose of his defence, "but for no other purpose, and upon no other grounds whatever."

Some further correspondence took place, in which the defendant stated that he could not, in order to obtain a copy of the evidence given, allow it to be considered as evidence affecting him, or as taken in his presence; nor could he, in ignorance of the case against him, enter upon his defence, even under protest; and the arbitrator adhered to the determination stated in his letter above cited.(a)

Erle and *Cleasby* now showed cause against the plaintiff's rule, and supported that of the defendant. The arbitrator has made no direct award as to the damages, but has found them hypothetically, stating facts for the determination of the court. He had indeed power to reserve points of law; but that did not take away his jurisdiction to decide the cause; and, if he could, he was bound to do it. When a point of law is reserved at *nisi prius*, the judge decides for one party or the other, so that, if no application is afterwards made to the court, that party may have judgment. Here the arbitrator should have acted on the same principle. No action would lie on this award. In the case *In the matter of Wright and the Cromford Canal Company*, 1 Q. B. 98, 101, it was objected "that the award is not final, inasmuch as the arbitrators and umpire refer points of law to the court

(a) An affidavit in answer was sworn by the plaintiff's attorney, accounting for some apparent delays on his part, and adding a few other statements, which did not materially alter the view of facts.

without authority to do so:" and the court said: "Had *the arbit-
 *244] rators abstained from deciding the points of law themselves, and simply found the facts, leaving the law to be applied to them by the court, this objection would have been tenable. But the case is otherwise: the arbitrators have decided the law: and the award would be sufficiently decisive and final, if the court were to refuse to entertain any question as to the points of law at all, as not being properly raised." Here the same objection arises, but cannot be so answered. In *Barton v. Ranson*, 3 M. & W. 322, the arbitrator stated facts, and awarded in favour of the defendant, adding, however, that, if on the circumstances stated the court should be of opinion that the plaintiff was entitled to recover, then he awarded for the plaintiff. The latter part of the award seems to have been considered void; and the award was sustained only because the arbitrator had previously given a positive decision in favour of the defendant, and therefore the hypothetical part might be rejected. In *Anderson v. Fuller*, 4 M. & W. 470, the arbitrator found for the plaintiff, awarding 254*l.* 10*s.* damages: but he then set forth facts, and stated that, if the court under the circumstances held the defendant liable to part only of the plaintiff's demand, the damages should be reduced to 125*l.* 17*s.*; if to no part, the verdict should be entered for the defendant. On motion to reduce the damages or enter a verdict for the defendant, it was held that the first finding was the award, and the motion, in substance, an application to set it aside.

After the long interval during which the proceedings here had been discontinued, the arbitrator ought not to have proceeded so hastily: at all events
 *245] he should not *have heard evidence *ex parte* without giving notice of his intention to do so. *Gladwin v. Chilcote*, 9 Dowl. P. C. 550, shows that a very strong case is requisite to justify proceeding *ex parte*, and that an arbitrator, meaning to do so, should give notice of his intention.

Other points were argued, which it is not thought necessary to report.)
Platt and Peacock, *contra*. There is no real objection to the award as not being final. [Lord DENMAN, C. J. We all think there is nothing in that point.] As to the proceeding in defendant's absence, notice that the arbitrator will proceed with the reference on a certain day is notice that he will then proceed *ex parte* if one of the parties absents himself without sufficient reason.

Lord DENMAN, C. J. I think it clear that the award, as to the three sums mentioned in the first part of it, is good. The form is peculiar; but the statement is like that of a jury in a special verdict, where facts are found by them subject to the opinion of the court. If there had been a proceeding *ex parte*, in the sense in which the defendant represents it, the objection would certainly have tended to set aside the whole award; but I think the arbitrator cannot truly be said to have so proceeded. The law is stated in *Kyd on Awards* (a) and in *Watson on Arbitration* (b) to be that, if either

(a) See pp. 100, 101, 2d ed.

(b) See pp. 160—162, 2d ed.

party, after the arbitrator has given him sufficient notice, and proper opportunities of attending, will not appear, the arbitrator may proceed in his absence. *Here the defendant had proper notice, and made an objection to attending; and several meetings, of which he had [*246 notice, were then held, he not attending. I think he is not entitled to complain. And, if there were a doubt on the correctness of what was done, the circumstances which took place afterwards would set it right. The arbitrator in my opinion was very liberal, and showed the greatest patience. When he said, "I will give you copies of the proceedings taken in your absence if only you will not treat me as arbitrator and no arbitrator," it was unjustifiable in the defendant to urge any other condition upon him. On the rest of the case we will take time for consideration.

PATTESON, J. As to the first point, the effect of the award is that the verdict at any rate shall stand for 579*l.* 19*s.*, but that it shall stand for one of the two higher sums if the court shall be of such or such an opinion on the facts stated. In *Barton v. Ranson*, 3 M. & W. 322, the arbitrator had no power by the order of reference to state facts for the judgment of the court: the only question was whether the court could collect from what he awarded that he had declared his own opinion. In *Anderson v. Fuller*, 4 M. & W. 470, the arbitrator had no authority to state facts specially; and the point decided was that the motion to reduce the damages, grounded on the provisional finding of the arbitrator, was in effect a motion to set aside the award previously made, and therefore came too late. The language cited from *In the matter of Wright and the Cromford Canal Company*, 1 Q. B. 101, does not bear out the present objection. The award here is final. *The objection, that the arbitrator had proceeded ex parte, seemed formidable, but in reality comes to nothing. It is [*247 clear that, if a party after due notice does not attend, much more if he says "I will not attend because you, the arbitrator, are receiving illegal evidence, and no award which you may make can be good," the arbitrator may proceed ex parte at once, without giving notice that he intends to do so. Perhaps it is more prudent to give such notice; but here the objection was altogether done away with by what passed afterwards.

COLERIDGE, J. The arbitrator was empowered to reserve points of law for the opinion of the court. It is contended that he ought first to have given an absolute opinion on the point in doubt, and then raised the same point for the court hypothetically. I see no use in this. He did pronounce judgment if the court shall hold in a particular way in one of three cases which were alternatively put. That was final. If the plaintiff was satisfied with the smallest sum mentioned, nothing more remained to be done: if he desired more, he might take the opinion of the court. As to the other question, I rest my opinion not so much on what passed after the ex parte hearings as on the proceedings at the time. The arbitrator had given sufficient notice. The defendant said that it was not his intention to be present, because, under the circumstances, the arbitrator could not make a

good award. After that he had no right to expect notice that the arbitrator would proceed *ex parte*; the law clearly being that an arbitrator may so proceed, due notice having been given and a party not attending.

*248] *WIGHTMAN, J. The arbitrator directed what should be done if the court were of a certain opinion; and he awarded to the plaintiff 579*l.* 1*9s.* at all events. The express object of the reference must fail if this were not held final. As to the other point, an arbitrator may proceed *ex parte* if a party is duly summoned and without sufficient cause omits to attend. Here the non-attendance was because the defendant said the arbitration must be abortive. After the first *ex parte* proceeding, the arbitrator offered the defendant ample opportunity of attending another time: and the defendant was not then ignorant of what had passed, for he had employed a short-hand writer to be present.

Lord DENMAN, C. J. I entirely agree that, when a party says to the arbitrator "I deny your authority," the arbitrator must have power to proceed *ex parte* at once. This is clear, without reference to the subsequent proceedings in the present case.

Rule for setting aside the award discharged.

On the other points, (except the objection to the award as not final, or certain,) *Cur. adv. vult.*

In the vacation after this term, (June 25th,) *The Court* gave judgment that the verdict should stand for 1165*l.* 1*s.*

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*GIFFORD v. WHITTAKER. June 7.

Plea, to assumpsit for money paid, &c.:

That, before action brought, defendant gave plaintiff, and he received from defendant, authority to receive, for defendant and as his agent, moneys exceeding the sum in the declaration mentioned, then due to defendant, and to pay himself thereout in full satisfaction and discharge of the promises, &c. and of all damages, &c.; and defendant at the time of giving such authority did at plaintiff's request intrust him with the sole collection of the said moneys, on the terms, then assented to by plaintiff and defendant, that plaintiff should use reasonable diligence in endeavouring to collect the same, and defendant should not collect or endeavour to collect them otherwise than by plaintiff's agency so created as aforesaid: that afterwards, and before action brought, plaintiff had the option of receiving, and might and ought to have received, the said moneys, to an amount exceeding the present demand, in pursuance of the said authority, and had also the option of paying himself, out of the moneys which he might have so received, the amount now claimed, in such satisfaction, &c.: and that plaintiff did not nor would use reasonable diligence, &c. in endeavouring to collect and receive the said moneys when he might have so received, and had the option of so receiving the same, but, while the said authority was in force, so negligently conducted himself in endeavouring to collect and receive the said moneys, that by reason thereof he did not receive the same, or any part thereof, and thereby, and without defendant's default or consent, before action brought, the chance of the moneys or any part thereof being received by or on behalf of defendant became desperate, and the said moneys thereby were and are lost to him.

Held, on general demurrer, a bad plea of accord and satisfaction.

ASSUMPSIT for money paid, money lent and interest, and on an account stated.

Plea 2. That, before the commencement of this suit, to wit on, &c ,

defendant gave to plaintiff, and plaintiff then received from defendant, authority to receive for and as the agent of defendant certain moneys to a large amount, to wit to an amount exceeding the moneys in the declaration mentioned, then due to defendant, and out of those moneys to pay himself, the plaintiff, money, to wit to the amount of the moneys in the declaration mentioned, in full satisfaction and discharge of the promises in the declaration mentioned, and of all damages that might be by the plaintiff sustained by reason of the non-performance thereof; and defendant then, at the time of giving the said authority, did at plaintiff's request intrust plaintiff with the sole collection of and endeavouring to collect the said moneys, upon the terms, then assented to both by plaintiff and defendant, that plaintiff should use reasonable care, diligence, and skill in endeavouring to collect and receive the said moneys, and that defendant should not collect or receive, or endeavour to collect or receive, the said [250] moneys otherwise than by the agency of the plaintiff so created and authorized as aforesaid. That afterwards, and before the commencement of this suit, to wit on, &c., plaintiff had the option of receiving, and then might and ought to have received, the said moneys to a large amount, to wit to an amount exceeding the moneys in the declaration mentioned, in pursuance of the said authority and trust, and had then also the option of paying himself, the plaintiff, out of the said moneys which he might so have received, the amount of the moneys in the declaration mentioned, in such satisfaction and discharge as aforesaid: Averment that plaintiff did not nor would use reasonable care, diligence, and skill in endeavouring to collect and receive the said moneys or any part thereof, when he might so have received the same as aforesaid and had the option of so receiving the same, but, on the contrary thereof, then, while the said authority and trust were in full force, and not in any way renounced by plaintiff, and after the making of the promises in the declaration mentioned, so carelessly, negligently, and unskillfully conducted himself in endeavouring to collect and receive the said moneys, that by reason thereof plaintiff did not receive the said moneys nor any part thereof, and thereby, and without any act or default of defendant, and without the privity or consent of defendant, then, before the commencement of this suit, to wit on, &c., the chance of the said moneys or any part thereof ever being received by or on behalf of defendant became and was wholly desperate, and the said moneys [251] were thereby then, and still are, wholly lost to the defendant. Verification.

General demurrer. Joinder. The ground of demurrer stated in the margin was, that the plea professes to be pleaded by way of discharge and satisfaction, but shows no discharge or satisfaction, nor any other answer.

The court now called upon

W. H. Watson for the defendant. The authority given to the plaintiff had the same effect as if the defendant had placed a check in his hands for the amount due; in which case the plaintiff would have been bound to use

proper diligence in obtaining payment, and to apprise the defendant if the check were dishonoured; *Chamberlyn v. Delarive*, 2 Wils. 353.(a) [COLERIDGE, J. In the case of a check given would not payment be pleaded?](b) The delivery of a check would not be a satisfaction in itself. It only suspends the remedy till the time of payment. If the giving of a check were pleaded, dishonour would be an answer. The laches here is as plain as in *Chamberlyn v. Delarive*, 2 Wils. 353; (a) the plea avers that the plaintiff had the option of receiving the money and paying himself out of it, but did not use due diligence in so doing, and thereby, without default in the defendant, the chance of recovering became desperate, and the money lost. *Smith v. Ferrand*, 7 B. & C. 19; and the *Anonymous Case*, 7 B. & C. 24, cited by BAYLEY, J., and *Horsfall v. Fauntleroy*, 10 B. & C. 755, show the effect of laches under *circumstances like the present. In cases *252] before the new rules this defence was not specially pleaded; but it was so pleaded in *West v. England*,(c) and the plea was not objected to. All the authorities on the present question were there cited. The transaction here is like the assignment of a debt: the defendant had money due to him, and gave the plaintiff an irrevocable authority to receive it. Assignment of a debt is good consideration for a promise, and may likewise be consideration for the discharge of a liability.

Montagu Smith, contrà, was not heard.

LORD DENMAN, C. J. Clearly this is no accord and satisfaction.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Judgment for plaintiff.

(a) See *Griffiths v. Owen*, 13 M. & W. 58.

(b) See *Pearce v. Davis*, 1 Moo. & R. 365; *Hough v. May*, 4 A. & E. 954.

(c) Not reported. The case was argued, last term, on motion for a new trial; and the court, without deciding any general question of law, made the rule absolute. The parties afterwards came to a compromise.

MAC CARTHY, Clerk, v. NEPEAN, Bart. June 10.

In a declaration on a feigned issue, tried under stat. 6 & 7 W. 4, c. 71. s. 46, to review the decision of a tithe commissioner, there were three counts, in each of which the plaintiff denied, and the defendant asserted, the existence of a modus therein severally described; the three moduses being in respect of three independent tithable subjects. Verdict for plaintiff on one count, and for defendant on the two others. The court allowed no general costs, but gave both parties the special costs of the issues on which they had respectively succeeded.

THE plaintiff was vicar of the parish of Loders, in Dorsetshire, the defendant a landholder therein. A question had been raised, before an assistant tithe *commissioner, as to certain moduses, the existence *253] of which defendant asserted and plaintiff denied. The commissioner affirmed all the moduses. The plaintiff, being dissatisfied with this decision, brought the present action, under stat. 6 & 7 W. 4, c. 71, s. 46, upon feigned issues. The declaration contained three counts. The first count

was on the question whether a certain *modus* existed for every couple consisting of an ewe and a lamb lambing and lambled, in lieu of tithe of wool and lambs. The second count was on the question whether a certain *modus* existed for every acre of meadow land mowed and made into hay, in lieu of tithe of meadow hay. The third count was on the question whether a certain *modus* existed for every milch cow in lieu of tithe of milk yielded and any calf or calves produced by the said cow.

On the trial, before WIGHTMAN, J., at the last Dorsetshire assizes, after the defendant (on whom the proof lay) had closed his case, a verdict was taken, by consent, for the plaintiff on the first count, and for the defendant on the second and third counts.

Butt, in last Easter term, obtained a rule calling on the defendant to show cause why the *postea* should not be delivered to the plaintiff, and the costs taxed, and a like execution had for the same as if the same had been recovered upon a judgment of record in the court.

Crowder (with whom was *Moody*) now showed cause. The plaintiff, having failed as to two out of the three issues, is not entitled to the general costs. In *Lewis v. Holding*, 2 M. & G. 875, there was a feigned issue on the question "whether "five horses, or one or some of them," were the property of the plaintiff; and the jury found that two were his [*254 property and the other three not : on which the court gave no general costs, but allowed to each party such portion of the costs as related to the part on which he had succeeded. That, indeed, was a decision on the Interpleader Act, 1 & 2 W. 4, c. 58, s. 6 : but the same principle will apply to all feigned issues. [Lord DENMAN, C. J. The rule laid down in *Lewis v. Holding*, 2 M. & G. 875, does seem to me more reasonable than one which we had acted upon.](a) The court then called on

Butt, *contrà*. The plaintiff has succeeded as to the whole of one independent issue : he must therefore have general costs as to that issue. He has been compelled to go to trial to recover that which it now appears he is entitled to. In *Lewis v. Holding*, 2 M. & G. 875, there was only one issue ; and that was found partly for the plaintiff and partly for the defendant ; the case as to the whole declaration was similar to the case on the second and third issues in *Routledge v. Abbott*, 8 A. & E. 592.(b) This is like the common case of a declaration with three counts : if the plaintiff succeeds on only one he has the general costs, though the defendant has the special costs of the other two. [Lord DENMAN, C. J. But suppose those were three separate records.] Then the plaintiff, if he succeeded on one only, would have the general costs on that one. [Lord DENMAN, C. J. And the defendant the general costs on the other two.] *The plaintiff in ejectment has the general costs if he recover any of the land [*255 claimed ; though the verdict is distributable, *Doe dem. Errington v. Erring-*

(a) Referring, perhaps, to *Staley v. Bedwell*, 10 A. & E. 145.

(b) See *Daniel v. Barry*, 4 Q. B. 59.

ton, 4 Dowl. P. C. 602.(a) If, however, the distinction suggested between the present case and *Lewis v. Holding*, 2 M. & G. 875, is not tenable, the question in effect is, whether the costs shall be given according to the ordinary rule in actions or according to the rule in cases under the Interpleader Act.

Per Curiam : (b)

Ordered, that no general costs of the cause be paid by either party : but that one of the masters do tax such costs for the plaintiff, as well interlocutory or otherwise, as have been necessarily occasioned by preparing and trying the issue on which the plaintiff succeeded, and all subsequent costs connected therewith : and that the said master do tax such costs for the said defendant, as well interlocutory or otherwise, as have been necessarily occasioned by preparing and trying the issues on which the defendant succeeded, and all subsequent costs connected therewith. And it is also ordered that such costs, when so taxed, shall be respectively paid by one party to the other. And it is lastly ordered that the said master shall be at liberty to deduct one set of costs from the other, and to make an allocatur for the balance.

(a) See *Doe dem. Bowman v. Lewis*, 13 M. & W. 241.

(b) Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

*256] *The QUEEN v. OXLEY and Another, Justices of RIPON.

June 11.

Under stat. 2 & 3 Vict. c. 85, if application was made for an order of maintenance, and the party charged allowed the case to be partly heard at petty sessions by witnesses being examined, he could not take away the jurisdiction of the petty sessions by declaring, under sect. 3, that he was desirous that the charge should be heard at the quarter sessions. The election must have been made before the hearing commenced.

An order of maintenance directed the party charged to pay a sum for expenses incurred since the birth of the child, which was stated in the order to have taken place more than six months before the order. *Held*, bad, under stat. 4 & 5 W. 4, c. 76, s. 73, although it was deposed that the expenses were calculated only for the time during which the child had been chargeable, which was less than six months. But, *held*, that the order was nevertheless good as to the residue, which directed payment in respect of future expenses.

The order directed payment to be made to the churchwardens and overseers of a township to which the child was chargeable. The township had overseers, but no churchwardens; the parish in which the township lay had churchwardens. *Held*, no objection to the order. *Per* Patteson and Williams, Js., dubitante Lord Denman, C. J.

MARTIN, in last Easter term, obtained a rule calling on two justices in and for the Liberty of Ripon, in Yorkshire, to show cause why a certiorari should not issue, to remove into this court the order, hereinafter mentioned, made upon John Brown.

By the affidavits in support of the rule, it appeared that Brown received from four persons, of whom two added to their signature the word "churchwardens," and the other two the words "overseers of the poor of the said

township of Ripon," a notice, which was set out, signed by the four, of their intention to apply at the petty sessions to be holden for the Liberty of Ripon, &c., for an order of maintenance upon him, in respect of a bastard child; "chargeable to the township of Ripon." The notice stated that "we, the undersigned, being the overseers of the poor of the said township of Ripon, have made diligent inquiry," &c., and that "we, as such overseers of the said township, intend to make application," &c. The affidavit stated "that the said churchwardens and overseers," and Brown, attended "at the said sessions by their respective attorneys, and Brown was also personally present: That the attorney for the applicants stated to the justices the nature of the application, and examined the mother of the bastard, and a second witness who was called to corroborate her testimony; and both witnesses were cross-examined: That, on the close of the cross-examination of the second witness, and before the justices had proceeded to pronounce their decision upon the case, Brown's attorney declared to them that Brown "was desirous that the said charge should be heard and determined at the then next ensuing quarter sessions" for the Liberty, and was ready to enter into a recognisance, &c., to appear at such sessions, and to pay costs in case the quarter sessions should adjudge him to be the putative father: That Brown and two sureties were then and there ready to enter into the recognisances: That the justices determined that the hearing should be then proceeded with, as they were of opinion that Brown's application was made too late: That the attorney for the applicants afterwards closed his case; and the justices then made an order, the material parts of which were as followa.

"Liberty of Ripon, } "At a petty sessions," &c., "holden at," &c., "on
in the } Friday, the second day of February, in the seventh year,"
County of York. } &c., "1844."

"Whereas, upon the hearing of the application of the churchwardens and overseers of the poor of the township of Ripon, in the said Liberty, seven days' notice of which application having been duly proved before us to have been given by the said churchwardens and overseers of the poor to John Brown, hereinafter named, it appears to *us, the undersigned justices of the peace assembled at the said petty sessions, that a [*258 male bastard child was lately, that is to say on the 27th day of February, now last past, born in the township of Markington with Wallerthwaite in the said Liberty, on the body of," &c., "and that the said child has, by reason of the inability of the mother of the said child to provide for the maintenance of the same child, become chargeable to the said township of Ripon, in the said Liberty," &c. The order then proceeded to adjudicate that Brown was the father, and that he "shall forthwith pay or cause to be paid to the said churchwardens and overseers of the poor of the said township of Ripon, the sum of 9s. 6d., to reimburse the said township the actual expense incurred in the maintenance and support of the said bastard child from the time of its birth as aforesaid to the time of making this our order;

and shall also, weekly and every week, from the date of this order, and so long as the said bastard child shall be chargeable to the said township of Ripon, and until the said bastard child shall attain the age of seven years, (if he shall so long live,) pay or cause to be paid unto the churchwardens and overseers of the poor of the said township of Ripon, the sum of 1s. 6d. to reimburse the said township of Ripon the actual expense to be incurred in the maintenance and support of the said bastard child. Given under our hands and seals, the day and year first above written."

It was further deposed that the township of Ripon was one of several townships comprised in the parish of Ripon, and that, although there were churchwardens of the parish, there were none of the township.

In the affidavits in answer, it was deposed that the child became chargeable to the township of Ripon, for *the first time since its birth, on
*259] 6th January, 1844. That the 9s. 4d. was ordered upon a calculation of the expense incurred since that day. That neither Brown nor his attorney made any objection to the hearing by the justices till after the cross-examination of the second witness, and after the justices had declared that they required no further corroborative evidence. That, at the close of the case on the part of the applicants, the justices called upon Brown and his attorney to answer the case, which they refused to do.

Baines and *Pickering* now showed cause. The first objection to the order is that the notice given by Brown's attorney deprived the justices of jurisdiction, under stat. 2 & 3 Vict. c. 85, s. 3, which enacts that, if the person charged with being the putative father "shall declare to the justices in such special or petty session that he is desirous that the charge shall be heard and determined at the Quarter Sessions," and enter into the recognisance there prescribed, "then the justices in special or petty session shall not proceed further to hear the charge," but shall take the recognisance, &c.; "and in such case all further proceedings in the matter of such charge shall be had before the Court of Quarter Sessions as if this act had not been made:" that is, the proceedings shall take place, as under stat. 4 & 5 W. 4, c. 76, s. 72, at Quarter Sessions. (a) It was competent to Brown to elect, in the first instance, that the charge should be heard at Quarter Sessions: but, after the hearing had commenced, he could not do so.

*His election was then made. The words "shall not proceed further to hear" will be relied upon on the other side, as showing that the legislature meant to give the power of stopping the hearing, at petty session, in any stage before actual adjudication. That construction, however, is inconsistent with the words following: the "further proceedings" would, on that supposition, mean the remaining evidence only, and the adjudication: and it cannot have been meant that one part of the case should be heard at petty sessions and the other at Quarter Sessions: nor would that be a proceeding "as if this act had not been made." The party will be held to his election, as in *Rez v. The Justices of Yorkshire*, 3 T. R. 776,

(a) See now stat. 7 & 8 Vict. c. 101, sects 2, 3, 4.

where an appellant, having an option to which of two sessions he should appeal, and having once appealed and failed from non-performance of conditions preliminary to the appeal, was considered to have exercised his option, and was not allowed to appeal to the other sessions. The attempt, here, was to try the chance of the application failing, and, when it appeared likely to succeed, to obtain a fresh hearing, though no appeal is given under this statute. In *Regina v. Stamper*, 1 Q. B. 119, it was held that overseers had made an application, and were liable to costs under stat. 4 & 5 W. 4, c. 76, s. 73, because they had entered an appeal, though they did not appear, and though no order was made on the application. The justices here had power to enter upon the inquiry, no declaration having been previously made by Brown; and, that being so, the entering upon the inquiry vested the jurisdiction; *Regina v. Bolton*, 1 Q. B. 66. So an appearance *at petty sessions cures want of notice; *Regina v. The Justices of Wiltshire*, 12 A. & E. 793. The general principle acted on by this [*261 court is not to allow a party who has commenced one course of proceeding to abandon that and try another: thus, where a case had been granted by the sessions to a party who would not bring it up, this court refused a mandamus to the sessions to enter continuances and hear; *Rex v. The Justices of Suffolk*, 6 A. & E. 109.

The second objection is that the order directs a payment for maintenance from the time of the birth, which appears to have taken place more than six months before the date of the order, whereas, by stat. 4 & 5 W. 4, c. 76, s. 73, there is no power to order payment of the expense of maintenance for more than six months before the hearing. The words "from the time of its birth" do not necessarily include the whole time. Illegality will not be presumed; *Rex v. Stockton*, 5 B. & Ad. 546; and the affidavits explain that the expenses are really estimated for much less than six months before the order. At any rate, there is a mere excess of jurisdiction; and this part of the order may be rejected: or the statement of the date of the birth may be struck out altogether, like the inconsistent words in *Rex v. Gill*, Russ. & R. 431.

The third objection is that the order is to pay to the churchwardens and overseers of the township, whereas there are no churchwardens of the township. The overseers were entitled to apply: the addition of the churchwardens will not vitiate the order; *Regina v. Goodall*, 2 Dowl. P. C. (N. S.) 382; *Regina v. Rotheram*, 3 Q. B. 776. (*Rex v. Clifton*, 2 East, 168, was also cited.) [*262

Martin, contrd. First. The legislature probably intended that the party charged might have an opportunity of going to Quarter Sessions if he found that the two justices were proceeding in a course inconsistent with law: and this fact the party could not ascertain till the inquiry had proceeded at least so far as to show whether the course taken was free from objection. The words "further to hear" can have no meaning, unless with reference to a time at which some part of the hearing has taken place.

Secondly. The language of the order clearly comprehends more than the six months. [Lord DENMAN, C. J. We all think that, as to the 9s. 4d., the order is bad.]

Thirdly. The objection is, not that churchwardens are said to have joined in the application, (which was the point in *Regina v. Goodall*, 2 Dowl. P. C. (N. S.) 382,) but that the order is to pay to the churchwardens as well as the overseers, that is to persons that do not exist. [Lord DENMAN, C. J. This seems to me a very serious objection. The party may pay the churchwardens of the parish, and then be called on to pay by the overseers of the township.] The order should be accurately drawn, so that the person obeying it may be protected.

Lord DENMAN, C. J. There is, I think, nothing in the first objection. I infer from the words "further to hear" no more than this; that the proceeding may be *stopped before the hearing commences, by the party
 *263] making the declaration; upon which the case is to go no further, is not to go to a hearing. It would be a mere mockery if he could allow the proceedings to go on nearly up to the adjudication and then say, "now I will go to the Quarter Sessions." As to the 9s. 4d., the order clearly has directed that payment in respect of a term which goes too far back. On the third objection I entertain some doubt: but I am happy to find that my learned brothers feel none.

PATTESON, J. I see no doubt on the question as to the statute. The jurisdiction given to the Quarter Sessions was found to be inconvenient; and the legislature therefore compelled the parties to go to the petty sessions in the first instance. At the same time, they allowed the party charged to elect that the case should be heard before the Quarter Sessions. But it was not intended that he might take his chance of the case failing at the petty sessions, and, if it did not fail, might then go to the Quarter Sessions. The removal by certiorari is not analogous to this proceeding: there the command goes by the authority which the superior court has over the inferior one; here the only question is as to the effect of the statute. If it had been intended to give a right of appeal, the intention would have been shown by express words. I think the meaning, upon a grammatical construction, clear enough: the justices, if the party charged declares his election to go to the Quarter Sessions, are not "further to hear:" that is, they are not to go further so as to hear. The other construction would be quite contrary
 *264] to the meaning of the act. As *to the second objection, the 9s. 4d. must be struck out. As to the third objection, my lord does not quite agree with the rest of the court; I own, however, that I cannot see what harm the mention of churchwardens does. If there are churchwardens of the township, they are rightly mentioned. If there are not, I presume there are churchwardens of the parish: it has often been held that there must be such. In that case, they certainly are not churchwardens of the township: no payment, therefore, could be properly made to them. The order to pay directs a payment to persons not in existence, besides the pro-

per persons. What harm is there in that? Utile per inutile non vitiatur. That objection does not touch the jurisdiction. It merely shows that the order is partly inoperative.

WILLIAMS, J. I agree entirely in the construction which the rest of the court puts on the statute. To my mind the absence of any clause directly authorizing an appeal is conclusive. Whenever it is meant to give an appeal, the words are express: that is the case, for instance, as to orders of removal and rates. Here all that is given is a right to choose the tribunal: the party charged, if he does not like the case to be heard by the justices, may go to the Quarter Sessions. But he must make his election. The words "shall not proceed further to hear" mean "shall not proceed further by hearing." On the last objection I cannot feel myself free from doubt, since my lord has a difficulty. But I agree with my brother PATTESON. On the face of the documents, nothing appears as to the fact, except indeed that the parties applying might "be estopped from denying that there were churchwardens of the township. There is a jurisdiction [*265 over the subject matter *prima facie*: the objection must impeach the jurisdiction, or it cannot be heard. Then is the order invalid by reason of the insertion of "churchwardens?" It appears indeed that there are no churchwardens of the township, but only of the parish. But, whether that be so or not, the order will have the effect of directing the payment to the proper officers. If there are churchwardens of the township, the order is right: if there are not, it is a mere "nomen inutile," and the order can be obeyed only by paying to the officers properly named.(a) Rule absolute.(b)

Lord DENMAN, C. J. It will probably not be thought worth while to bring up the order for the purpose of striking out the 9s. 4d.

LEWIS v. PRIMROSE. June 11.

Under stat. 2 G. 2, c. 23, s. 23, an attorney's bill for work and disbursements in a suit must specify the court in which the suit was.

ASSUMPSIT for work and labour, money paid, and on an account stated.

Plea 1: as to the first and second counts, that the work and labour in the first count mentioned was done and performed by plaintiff as an attorney of the superior courts of law at Westminster, in and about the prosecuting *and defending for defendant, and on his retainer, in the said courts of law, of divers actions and suits; and that the moneys [*266 in the second count mentioned to have been paid, &c., were so paid as, and were, the disbursements made by plaintiff, as such attorney, in the course and for the purpose of such actions and suits; and that this action, so far as regards the said two counts, is brought for the recovery of fees,

(a) Coleridge, J., was absent.

(b) See *Regina v. Clarke*, p. 349, post.

charges and disbursements at law by plaintiff as such attorney of and for defendant: and that plaintiff did not, at any time before the commencement of this suit, deliver to defendant, or leave for him at his dwelling-house or last place of abode, any such bill of such fees, charges and disbursements, subscribed with the proper hand of plaintiff, as by the statute made in that behalf is required: verification. Replication: that plaintiff did, to wit a month before the commencement of this suit, deliver to defendant such a bill of the said fees, charges and disbursements in the first plea mentioned, subscribed, &c., as by the statute, &c., is required: conclusion to the country. Issue thereon. Plea 2: to the residue, nunquam indebitatus. Issue thereon.

On the trial, before WILLIAMS, J., at the Middlesex sittings in Hilary term, 1844, no evidence was offered on the second issue: but the plaintiff proved the delivery of a bill of costs, which was produced. By the bill, it appeared that the work was done and the money expended in an action: but the bill did not state in what court the action was. The defendant's counsel objected that this was not a compliance with stat. 2 G. 2, c. 23, s. 23. The learned judge reserved leave to move for a nonsuit: and the plaintiff had a verdict *on the first two counts. In the same term *267] *Platt* obtained a rule nisi for a nonsuit on the above point.(a)

Jervis and *Hoggins* now showed cause. It is not necessary to specify the court in the bill. Stat. 3 Ja. 1, c. 7, s. 1, enacts merely that "a true bill" shall be given. Stat. 2 G. 2, c. 23, s. 23, indeed speaks of attorneys and solicitors "of any of the courts aforesaid," and authorizes applications to, and orders by, "a judge or baron of any of the said courts respectively," and a taxation "by the proper officer of such court." But these expressions do not show that the bill must specify the court. In *Lester v. Lazarus*, 2 C. M. & R. 665, S. C. Tyrwh. & Gr. 129, ALDERSON, B., clearly inclined to the opinion that this was not necessary. Nor can any reason be given why it should be required: the defendant has always the means of knowing: the proceedings themselves afford the information. [PATTESON, J., mentioned *Lane v. Glenny*, 7 A. & E. 83.] The question was there raised; but the decision of the court was that the objection could not be taken under non assumpsit.

Platt and *Lush*, contrâ. In *Lester v. Lazarus*, 2 C. M. & R. 665, S. C. Tyrwh. & Gr. 129, there was no more than a suggestion of an argument from the bench: in *Lane v. Glenny*, 7 A. & E. 83, no opinion was indicated at all. Stat. 2 G. 2, c. 23, having been made for the protection of clients, will be liberally construed. The client is to be furnished, by the bill itself, with the means of knowing to whom he is to apply for a taxation. *268] *The application must be made in some court where the business was done; In *re Lord Cardross*, 5 M. & W. 545. It is said that the client may learn what the court was from the record of the proceedings

(a) The rule was also for setting aside the nisi prius record and all proceedings subsequent thereto, on a point as to which the court pronounced no opinion.

themselves; but the documents may be all in the hands of the attorney, who may refuse to show them, or may give wrong information.

LORD DENMAN, C. J. With all respect for the opinion which was given in the court before which the point did not strictly arise, I must say that this objection must prevail, or the statute be in effect repealed. The very object of the enactment is, that the client, if he likes, may take the bill to another attorney for his advice upon it. Why is the client to be forced to ask questions? And how can we say that he is told in respect of what business the charge is made, when he is not told where the business was done? A notice of action to a magistrate gives, as has been held, insufficient information, if it do not specify the time and place at which the matter of complaint arose.^(a) In one case, as in the other, the facts which are spoken of must be fully brought to the knowledge of the party receiving the notice.

PATTESON, J. I am of the same opinion. There was no decision in *Lester v. Lazarus*, 2 C. M. & R. 665, S. C. Tyrwh. & Gr. 129; the point was not there before the court. The argument from the power which the court has to order taxation appears to me very strong. For how inconvenient it would be if a judge, in order to ascertain whether he has jurisdiction, had to receive evidence showing where the business had *been done. The rule imposes no hardship on the plaintiff: and I think [*269 it much the best to hold that a bill, to be correct, must specify the court and the cause.

WILLIAMS, J. I am of the same opinion. I cannot see why the plaintiff should object to so easy a matter as specifying the court. It is perfectly well known that the object of this statute was the protection of clients.

Rule absolute for a nonsuit.^(b)

^(a) See *Martins v. Upcher*, 3 Q. B. 66.

^(b) Coleridge, J., was absent. See stat. 6 & 7 Vict. c. 73, sects. 1, 37.

FERGUSON v. ROBERT CLAYWORTH and SARAH, his Wife.

June 12.

In an action against husband and wife, the wife, being taken in execution, applied to the court to be discharged, on affidavit stating that she lived separate from her husband, had for several years been boarded, lodged, and clothed at the expense of her son, was not possessed of or entitled to any property in possession, remainder or reversion, and had no means of satisfying, or expectation of being able to satisfy, the damages or costs.

Affidavit was made in answer, suggesting generally, on information and belief, that the wife had separate funds, and stating that the son, in consideration of his father's giving up to him a certain business, had covenanted to maintain his mother during her life, provided she would reside with him and assist him in such business; and that the wife, when arrested, was residing with the son and assisting him in the business.

Held that, under these circumstances, it lay on the wife to show that no property was held by the son to her use; and, this not being done, the court refused to discharge her from custody,

A RULE was obtained, this term, calling upon the plaintiff to show cause why the defendant Sarah should not be discharged out of the custody of the sheriff as to the damages and costs in this cause.

The action was for defamatory words spoken by the defendant Sarah. On the trial of the cause, after last Easter term, the plaintiff obtained a verdict with 40s. damages; for which, and the costs, the defendant Sarah was taken in execution. By her affidavit in support of the present motion, she stated that she had *lived separate from her husband for the last *270] seven years, and had, for several years, been boarded, lodged, and clothed at the expense of her son; that she was not possessed of, or entitled in possession, remainder or reversion, to, any property, estate, goods, chattels or effects whatsoever, necessary wearing apparel excepted; that she had no means of satisfying or expectation of being able to satisfy the damages and costs or any part thereof; and that she was not and had not been, since her separation from her husband, in the receipt of any allowance from him. The son made affidavit as to her circumstances in nearly the same terms.

Affidavit was made in answer by the clerk to the plaintiff's attorney, stating that no goods of the husband were to be found; and (on information and belief) that he had gone abroad to avoid an arrest, that the wife, when she separated from him, took 500*l.* with her, which she had kept, and that she had since received large sums in repayment of money lent by her while living with her husband. Also that, in 1839, Robert Clayworth, son of the defendants, in consideration of his father giving up to him the business then carried on by the father in the Whitechapel Road, had covenanted to support his mother out of the proceeds of such business; the words of the covenant being: "to maintain and keep his said mother for and during the term of her natural life, provided she shall think fit to reside with him and assist him in the business, and also to maintain his brothers and sisters until they attain the age of twenty-one years, in such manner in all respects as will prevent them or either of them being in any way chargeable to the said Robert Clayworth the elder." The deponent also stated, on information and belief, that *the wife when arrested was residing with her *271] son and assisting him in his said business in the Whitechapel Road. Another deponent also stated on information and belief that the wife had some separate property of which the defendant Robert had no knowledge.

Platt and *Warren* now showed cause. It is laid down in 1 Tidd's Practice, 194, 9th ed., that, in an action against husband and wife, "if the wife be arrested on mesne process, she shall be discharged on common bail;" "but where the wife is taken in execution, she shall not be discharged; unless it appear that she has no separate property, out of which the demand can be satisfied;" or that there is collusion against her between the husband and the plaintiff. Here it does not appear by the affidavits that there is no separate property, belonging to the wife or held in trust for her, out of which payment might be made. *Hoad v. Matthews*, 2 Dowl. P. C. 149, a similar case to this, may be cited on the other side. There it was suggested on affidavit that the wife had one-eighth part of certain leasehold property, and had a share in certain other property under a will:

PATTESON, J., said that the burden of showing that the property was for her separate use lay not on her but on those resisting the discharge; and he ordered that the rule to discharge should be made absolute unless it were shown within two days that the property was settled to the wife's separate use. But the facts here are stronger on the side of the plaintiff. In *Chalk v. Deacon*, 6 B. Moore, 128, it was held that the rule laid down in *Tidd* was not grounded on authority, and that "the granting or refusing a discharge to a married woman taken in execution was [272] matter for the discretion of the court in each particular case.

W. H. Watson and *E. James*, contra. No one in this case states positively that the wife has separate property: and the rule is clear, that, if the wife has none, she is entitled to her discharge; otherwise she might remain in prison for ever, not having the means of discharge within her control. *Hoad v. Matthews*, 2 Dowl. P. C. 149, is a direct authority for complying with this application.

Lord DENMAN, C. J. *Chalk v. Deacon*, 6 B. Moore, 128, shows that on a motion of this kind the court has a discretion to exercise; and, if so, I think we ought not to exercise it in favour of this application. The wife here is carrying on a distinct business, apart from her husband. That changes the onus of proof, supposing that in ordinary cases it does not lie upon the married woman. And, under the circumstances of this case, it is reasonable to expect proof from the wife that no one holds property for her. This is not inconsistent with *Hoad v. Matthews*, 2 Dowl. P. C. 149: there the *prima facie* case was stronger on behalf of the wife than it is here.

PATTESON, J. The proof in this case on the part of the wife is not satisfactory. The defendant and her son might have sworn directly that no part of the property held by the son was held to her use. As to *Hoad v. Matthews*, 2 Dowl. P. C. 149, I do not say that the onus of proof in such cases may not lie more upon the married woman than I was disposed to allow in that case. But there the plaintiff merely stated that the wife had leasehold property and other property under a will. That was different from the state of facts presented here. [273]

WILLIAMS and COLERIDGE, Js., concurred. Rule discharged. (a)

(a) See *Regina v. Johnson*, 5 Q. B. 335.

The QUEEN, on the Prosecution of WILLIAM WORTHINGTON, v. THOMAS WALTER WILLIAMS. June 12.

Where an indictment has been removed by certiorari and a conviction obtained, the person who, being a party grieved, retained and is liable to the attorney for the prosecution, is entitled, under stat. 5 & 6 W. & M. c. 11, s. 3, to the costs of such prosecution, though other aggrieved parties, after the attorney was retained and the indictment removed, agreed to contribute part of the costs, and they are not joined in the application.

THE defendant was indicted, at the sessions for the county of Chester, for a nuisance in creating offensive vapours and smells to the annoyance of

persons holding premises in the neighbourhood. The defendant removed the indictment by certiorari, and was convicted and sentenced; whereupon a side-bar rule was obtained, entitled as above, to tax the costs of the said W. Worthington as the prosecutor of the indictment, to be paid by the defendant to the said W. Worthington, his attorney or agent. In this term the court granted a rule to show cause why the side-bar rule for taxation should not be set aside.

The defendant's affidavit, on which the motion was made, stated his belief that the prosecution was commenced and carried on, not at the individual expense of Worthington, but by a public subscription agreed upon by certain inhabitants of Leftwich and Northwich, in Cheshire, including *274] Worthington, and in pursuance of a resolution passed at a public meeting held for that purpose before the indictment was preferred: and his belief also that, before the indictment was preferred, the attorney for the prosecution well knew that the expenses were not to be defrayed by Worthington individually, but by divers persons who joined in the resolution. The defendant also stated that Worthington did not prosecute as a public or civil officer, &c.

The prosecutor and his attorney made affidavit in answer, showing that the prosecutor was aggrieved in the occupation of his premises by the nuisance complained of; and that, in consequence, he obtained legal advice and preferred the indictment. They deposed that the prosecution was not commenced by public subscription as above stated, or in pursuance of the resolution of a public meeting; but that, after the bill was found and the indictment removed, three persons, named in the affidavit, each of them holding premises within sight and smell of the nuisance, agreed to contribute with Worthington to the expenses of the prosecution.

Welsby now showed cause. *Rex v. Cook*, 1 Man. & R. 526, is relied upon in support of this application: but there the costs (on indictment for misdemeanor in disinterring a corpse for dissection) had been defrayed by a public subscription: it was not shown that the persons who had appeared as prosecutors, and who were the relations of the deceased, had contributed any part; and on that ground it was held that they could not demand costs under stat. 5 & 6 W. & M. c. 11, s. 3. Here the party applying is a contributor, and is entitled to costs as a party grieved, according to *Rex v. Dewnap*, 16 East, 194.

*275] **Cole*, contra. *Rex v. Cook*, 1 Man. & R. 526, applies in principle to the present case, where the costs are applied for by one person, but the expenses were paid by four. In *Rex v. Dewhurst*, 5 B. & Ad. 405, and *Rex v. Edwards*, 5 B. & Ad. 407, note (a), it was held that the person on whom the injury had been inflicted was not entitled to costs as the party grieved, the prosecution having been carried on by others. And, so far, the decision in the latter case is confirmed by *Regina v. Earl Waldegrave*, 2 Q. B. 341, where the court held that, if public officers indict for an assault upon one of their subordinates in the execution of his duty, and

provide for the expenses of prosecution, the officers prosecuting, not the injured party, may demand costs under the statute. Convenience of practice seems to require that such costs should not be applied for, unless by the party or parties entitled to the whole. The rule here is entitled "The Queen, on the prosecution of W. Worthington, against," &c. It should have been "on the prosecution of W. Worthington and three others." That was the form in *Rex v. Taunton, St. Mary*, 5 M. & S. 465, where the costs were claimed by all who were entitled, namely the constable and five parties grieved.

LORD DENMAN, C. J. Worthington is clearly a "party grieved:" and he is the prosecutor; for he is liable to the attorney. It is true there may be inconvenience in the inquiry how much of the costs is due to one party and how much to another; and it is urged that for this reason Worthington alone ought not to apply; but the argument leads me to the opposite conclusion. He being a party grieved and the prosecutor, it would be an impertinent inquiry how much of the costs may be [276 ultimately due to others. A person who is party grieved and prosecutor is entitled to the costs though others may have assisted him in carrying on the prosecution. In *Rex v. Cook*, 1 Man. & R. 526, the subscribers, and not the parties applying for costs, had instituted the prosecution. This rule must be discharged.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Rule discharged.

WAKEFIELD v. NEWBON and Others.

The mortgagee of lands handed over the deeds to his attorney. The mortgagor paid the principal and interest, and the lands were reconveyed to him.

Held, that the attorney could not retain the deeds against him, as a security for the expenses of the transaction due from the mortgagee to the attorney:

And that the mortgagor, having, under protest, paid such expenses to the attorney in order to get the deeds back, might maintain assumpsit for money had and received against the attorney for the money so paid:

And that the attorney was a principal in the transaction, and could not allege that the action should have been brought against the mortgagee.

ASSUMPSIT for money had and received, and on an account stated.

Plea: Non assumpsit.

On the trial, before LORD DENMAN, C. J., at the London sittings after Easter term, 1843, the following facts appeared, according to the statement made by the lord chief justice in delivering the judgment of the court as after mentioned.

"This action was brought by a mortgagor against the mortgagee's solicitors to recover a sum of money which the defendants had exacted from the plaintiff by refusing to redeliver his title deeds after a reconveyance to him of the mortgaged property on payment of principal and interest, unless the plaintiff would also pay the amount of the [277

defendants' bill of costs. The verdict was taken for 11*l.* 12*s.* 5*d.*, the amount so exacted : but the defendants had leave to move for a nonsuit if the court should think the action not maintainable, or for reduction of the damages to 5*l.* if the jury were wrong in deducting certain items from the bill.(a) One of the charges was in respect of the reconveyance : but other parts of the bill arose exclusively from the relation of the mortgagee to the defendants, as client and solicitors."

In Trinity term, 1843, *Platt* obtained a rule nisi accordingly. In Easter term, 1844,(b)

Knigles and *Miller* showed cause. The plaintiff does not complain as to the costs of the reconveyance. But all the money paid beyond those relates merely to a debt due to the defendants from their client ; the mortgagee could not have recovered this against the plaintiff, and therefore the defendants cannot have a lien for it ; for their right cannot extend beyond that of the mortgagee who delivered the deed to them ; *Hollis v. Claridge*, 4 Taunt. 807. *Ogle v. Story*, 4 B. & Ad. 735, will be cited for the defendants. There the plaintiff was not the mortgagor, but had purchased from the mortgagor ; and the court seemed to rest their decision on the principle of *caveat emptor*. It seems to have been conceded that the plaintiff was indebted to the attorney in the full amount *of the costs fairly incurred ; the real question being whether he could dispute the fairness of the charges. The action appears to have been for the excess above the fair charges.(c) *Pratt v. Vizard*, 5 B. & Ad. 808, is in favour of the plaintiff. [WIGHTMAN, J. The client of the defendants there had no right to detain the title deeds at all.] The court said that the client could give no lien which he had not himself ; and therefore that the lien could be supported only on the ground that the defendants were the plaintiff's solicitors, which the facts of the case negatived. In *Harrington v. Price*, 3 B. & Ad. 170, a vendor of an estate retained the deeds, and afterwards raised a sum of money from another party, and deposited the deeds with him : and it was held that this party could not hold the deeds against persons claiming under the vendee.

Platt and *Butt*, contra. In *Hollis v. Claridge*, 4 Taunt. 807, and *Pratt v. Vizard*, 5 B. & Ad. 808, the clients of the defendants had no right to detain the deeds at all against the plaintiffs : the property was never actually conveyed away from the plaintiffs. But *Ogle v. Story*, 4 B. & Ad. 735, cannot be distinguished. The court there considered that the party who purchased the mortgagor's interest stood exactly in the position of the mortgagor ; and the question therefore was, whether the mortgagor could recover back the deeds which the mortgagee had handed over to the defendant : nothing turned on the amount. [WIGHTMAN, J. The amount was

(a) It is not thought necessary to detail the items.

(b) April 16th. Before Lord Denman, C. J., Patteson and Wightman, Ja. Williams, J., was sitting at the Central Criminal Court.

(c) In the present case the defendants had made out a bill against the plaintiff ; but the court considered that circumstance unimportant.

clearly material; for, when the mortgage is paid off, the mortgagor is at least entitled to recover the deeds subject to the lien.] Here [279 the amount is not to be limited as the plaintiff contends: but, even supposing that the sum paid was not all justly due from the plaintiff to the defendants, the action does not lie. It is assumpsit for money paid, under protest, upon duress of goods. Money so paid is not recoverable; *Lindon v. Hooper*, 1 Cowp. 414; *Brown v. McKinally*, 1 Esp. N. P. C. 279. The plaintiff should have tendered the amount really due; and he might then have brought trover if the deed had been detained. [WIGHTMAN, J. Do you say only that money paid under duress of goods cannot be recovered where the complaint is merely that too much has been exacted, or do you put the proposition generally?] Generally. The judgment in *Skeate v. Beale*, 11 A. & E. 983, 991, goes that length. The court there refused to consider an agreement to pay money void which was extorted by duress of goods; and Lord DENMAN, C. J., said that, even if the money had been paid, no action for money had and received could have been sustained. [WIGHTMAN, J., mentioned *Shaw v. Woodcock*, 7 B. & C. 73. *Miller*. The principle of that case was acted on in *Smith v. Sleep*, 12 M. & W. 585.] *Shaw v. Woodcock*, 7 B. & C. 73, seems to be overruled by *Skeate v. Beale*, 11 A. & E. 983, 991, which agrees with *Lindon v. Hooper*, 1 Cowp. 414. [PATTESON, J. In *Lindon v. Hooper*, 1 Cowp. 414, there was an illegal distress: a detainer is not quite the same thing.] Every illegal detaining is a fresh taking; *Evans v. Elliott*, 5 A. & E. 142. The courts incline against reopening settlements of account; *Wilson v. Ray*, 10 A. & E. 82. Further, even if the money be recoverable, the party to be sued is the mortgagee, the client of the defendants, and not the defendants, who received the money as representing the mortgagee; *Stephens v. Badcock*, 3 B. & Ad. 354; *Bamford v. Shuttleworth*, 11 A. & E. 926. [280

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (May 27th,) delivered the judgment of the court. After stating the facts as ante, p. 276, his lordship proceeded as follows.

We are of opinion that the defendants were clearly wrong in withholding the deeds till the latter sum was paid: for it appears from *Hollis v. Claridge*, 4 Taunt. 807, and is the known practice, that a mortgagee cannot, by handing over deeds to his attorney, create a new lien against the mortgagor in respect of a debt of his own.

But an objection to the maintenance of the action was drawn from certain expressions employed by me in a late judgment of this court, *Skeate v. Beale*, 11 A. & E. 983, 991. That case was not alluded to in *Parker v. The Great Western Railway Company*, 7 Mann. & Gr. 253, 292, in the Common Pleas, where that court, in conformity to a late decision of the Exchequer,^(a) and to some former decisions of this court, laid down the principle that money extorted by duress of the plaintiff's goods, and paid

(a) *Smith v. Sleep*, 12 M. & W. : 85.

by the plaintiff under protest, may be recovered in an action for money had and received. In this court, we were required, in considering a case of *Ashmole v. Wainwright*, 2 Q. B. 837, to give some attention to the doctrine in *Skeate v. Beale*, 11 A. & E. 983, 991. It was by no means unsupported by some ancient authorities; *but perhaps it was laid down
 *281] in terms too general and extensive. The case itself, however, was satisfactorily shown to be distinguishable, both from *Ashmole v. Wainwright*, and from the present case: and the principle just stated must be taken as well established and generally recognised. It may produce the inconvenience of a circuitry of action: but the evil of allowing extortion by means of a wrongful detention of goods would be much greater; and the wrong-doer has no right to complain when he is compelled to restore money which he was warned that he had no right to extort. The case is wholly different from that class where the parties have come to a voluntary settlement of their concerns, and have chosen to pay what is found due.

A third defence was rested on the case of *Bamford v. Shuttleworth*, 11 A. & E. 926, where a purchaser had paid the agreed price of an estate to the vendor's attorney, but was holden to have no right of action against him for the price, when the purchase went off for defect of title. But there the attorney received the money merely as agent for his client, to whom alone he was responsible for it: here the attorneys insisted on withholding the deeds for their own benefit, to secure the payment of their own bill. It is a mistake to say that there is no privity between the plaintiff and defendants. The privity in the original transaction was indeed between the defendants and their client: but, when the defendants compelled the plaintiff to part with money in order to regain possession of his rights, the law created a privity between them, and implied a promise to repay what the defendants should appear to have improperly obtained.

*It follows that the verdict must stand for the plaintiff, the damages
 *282] being reduced to 6*l.* 12*s.* 5*d.*, the difference between the whole sum received by the defendants and the 5*l.* due from the plaintiff to the defendants.

Rule accordingly.(a)

(a) See *Davies v. Vernon*, post. (Trin. Vac., July 6th, 1844.)

**YATES v. THOMAS TEARLE and EBENEZER TEARLE, YOUNG
and CLEMMAN.**

Declaration in case alleged, in all the counts, that plaintiff held a messuage and premises, with the appurtenances, as tenant thereof to defendant at a rent therefore payable by plaintiff to defendant; and it complained, in the first count, that defendant took plaintiff's goods as and for a distress for alleged arrears of the said rent, whereas no rent was due; in the second count, of an excessive distress for arrears of rent claimed to be due for the said tenements; in the third count, of an irregular sale of goods seized as in distress for alleged arrears of the said rent.

Defendant, as to all the counts, traversed the holding modo et formā. Held:

(1.) That the traverse was not immaterial:

(2.) That it was not too large, as putting in issue the tenancy of all the promises mentioned in the several counts.

CASE. The first count charged that plaintiff, before and at the time of the committing, &c., held "a certain messuage and premises, with the appurtenances, as tenant thereof to the defendants, Thomas Tearle and Ebenezer Tearle, at and under a certain rent therefore payable by the plaintiff to the said defendants, T. Tearle and E. Tearle:" yet defendants, contriving, &c., to wit on, &c., wrongfully and injuriously seized and took, "in and upon the said tenement with the appurtenances," divers goods and chattels of plaintiff, to wit, six boxes of nails, &c., of great value, to wit, 200*l.*, "as and for a distress for certain alleged arrears of the said rent," to wit, 12*l.* 15*s.*, "by the defendants then pretended to be due and in arrear to the said defendants, T. Tearle and E. Tearle, for the said tenements;" and afterwards, to wit on, &c., wrongfully condemned the said goods and chattels, "as such distress for the said *pretended arrears of rent;" [283
whereas, in fact, at the times when defendants distrained and condemned as aforesaid, "no rent was due or in arrear to the defendants, Thomas Tearle and Ebenezer Tearle, for or in respect of the said tenements with the appurtenances." Plea 2, to the first count: that plaintiff "did not hold the said messuage with the appurtenances in the declaration mentioned as tenant thereof to the said defendants, T. Tearle and E. Tearle, in manner and form," &c.: conclusion to the country.

The second count charged that plaintiff, before and at the time of the committing by defendants of the grievances after mentioned, and after the committing of the grievances by defendants in the first count mentioned, "held the said messuage and premises with the appurtenances in the said first count mentioned, as tenant," &c., (holding and rent as in first count:) yet defendants, contriving, &c., to wit on, &c., "wrongfully and maliciously took and distrained for certain arrears of rent," to wit, 3*l.* 18*s.* 10*d.*, "claimed to be due from the plaintiff to the defendants, Thomas Tearle and Ebenezer Tearle, for the said tenements, certain goods," &c., to wit, &c., of greater value than the said arrears and the costs, &c., of the distress, assignment and sale, to wit, of the value of 200*l.*, "and thereby took an excessive and unreasonable distress for the said arrears of rent;" whereas a

part of the goods, to wit, a third, was of sufficient value to have satisfied the said arrears, &c.; contrary to the statute, &c. The third count contained allegations similar to those in the second as to the holding and rent, and alleged a seizure of goods as and for a distress for alleged arrears of the said rent not exceeding 20*l.*, to wit, 3*l.* 18*s.* 10*d.*, and that defendants *284] sold and disposed of the goods distrained without causing them to be duly appraised by one(a) sworn appraiser. Plea 4, to the second and third counts, traversing the holding, as in the second plea.

Demurrer to the second and fourth pleas, assigning for causes the matters insisted on in the argument.

Joinder in demurrer.

The demurrer was argued in last Easter term.(b)

Flood for the plaintiff. First, the traverses are of an immaterial allegation. They appear to have been framed on a misapprehension of the decision in *Ireland v. Johnson*, 1 New Cas. 162. There case was brought for an irregular distress for rent alleged in the declaration to be due to J. and V.; and, on the trial, it appeared that the rent was due, not to J. and V., but to another party; and this, on a plea of Not guilty, was held to be a fatal variance. It follows that a traverse of the rent being due to J. and V. would have been good. But here the defendants traverse the holding as tenant, leaving the material allegation as to the rent unanswered. The first count states a distress when no rent was due: case lies upon that; and the plaintiff was not bound to bring trespass; *Branscomb v. Bridges*, 1 B. & C. 145; *Holland v. Bird*, 10 Bing. 15; *Smith v. Goodwin*, 4 B. & Ad. 413.(c) Here that allegation is left unanswered; and, therefore, it is admitted that no rent was due. In the second and third *counts, the *285] averment is that rent was due to the defendants: that is not traversed; and the declaration is not answered. Secondly, the traverses are too large; they put the plaintiff to prove that he held a messuage and premises with the appurtenances as tenant to the defendants; whereas it is enough if he so held a messuage only.

Humfrey, contrâ. First, if the plaintiff was not tenant to the defendants, the action should have been framed in trespass, not case, under 1 stat. 2 W. & M. c. 5, s. 5, and stat. 11 G. 2, c. 19, s. 19; (d) the traverses taken are therefore material on all the three counts. [WIGHTMAN, J. In *Salter v. Brunsden*, 4 Mod. 231, it was held that a declaration(e) for taking cattle in the name of a distress when no rent was due need not contain a formal averment of a demise.] Here the defendants must contend that case will lie between strangers for taking as in the first count. So, as to the second and third counts, the action is grounded on a remedy given only to tenants against landlords. Further, the demurrer is to both pleas: there

(a) See stat. 57 G. 3, c. 93, s. 1, and schedule; *Fletcher v. Saunders*, 1 Moo. & Ro. 378.

(b) April 26th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, J.

(c) See *Lear v. Caldecott*, 4 Q. B. 123.

(d) See *Winterbourne v. Morgan*, 11 East, 395, 401.

(e) In trespass, vi et armis.

fore, if either plea be good, the defendants must succeed; note (9) to *Duppa v. Mayo*, 1 Wms. Saund. 285 b, 6th ed.; where see note (h). [PARTISON, J. The courts appear to have receded from the doctrine of disallowing demurrers for being too large.] Secondly, the traverses are not too large: the plaintiff would succeed if he proved himself tenant, modo et forma, of any part.

**Flood*, in reply. First, it does not follow, from trespass being maintainable, that case is not: a tort may be qualified, though not [286 increased; *Bishop v. Viscountess Montague*, Cro. Eliz. 824. The tenancy, therefore, is immaterial. Secondly, the defendants should have denied the tenancy as to any part. That such an objection is fatal, if taken in time, appears to have been conceded in *Cobb v. Bryan*, 3 B. & P. 348.(a)

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (May 31st,) delivered the judgment of the court.

The declaration in this action is framed in case for an irregular distress. The first three counts contain an averment that the plaintiff held certain premises, with the appurtenances, as tenant to the defendants, Thomas Tearle and Ebenezer Tearle. The defendants have traversed this averment; and the plaintiff demurs on the ground that the averment is immaterial, and the traverse too large.

It is said that, if the averment were struck out, the declaration would still be good. It would be difficult to make any grammatical sense of any one of the counts, if it were struck out; but that alone is not a sure criterion. If the traverse taken by the pleas be, in substance, the same as might be taken on other words of the counts, it cannot be considered immaterial merely because it might be struck out without injury to the sense. Now the case of *Ireland v. Johnson*, 1 New Ca. 162, has determined that *it is necessary to show on the face of the declaration to whom rent is said to be due, and that a variance in that respect is fatal. The [287 defendants, therefore, have a right to traverse that rent was due to Thomas Tearle and Ebenezer Tearle; that is, in somewhat indirect words, to traverse that those persons were the landlords of the premises. Now the pleas traverse in direct terms the tenancy under those persons. Surely, therefore, such traverse cannot be immaterial. If the defendants were not the landlords, or servants of the landlords, of the premises, they must be mere strangers and trespassers, and the action should be trespass and not case, under the statutes, 1 stat. 2 W. & M. c. 5, s. 5, and stat. 11 G. 2, c. 19, s. 19. Who were the landlords was, therefore, a material question: and that is the substance of the issue.

We think there is nothing in the other objection about the traverse being too large because he might have held the house without appurtenances, or only a part of the house.

The judgment must be for the defendants. Judgment for defendants.

(a) See *Rubery v. Stephens*, 4 B. & Ad 241.

*288] *ELIZABETH HENDERSON v. BETHEL HENDERSON.

Declaration in debt charged that defendant was indebted to plaintiff in 8883*l.*, by virtue of a decree and sentence of the Supreme Court of Newfoundland, (established by stat. 5 G. 4, c. 67,) in a cause on the equity side of the said court, wherein the now plaintiff and others were plaintiffs, and the now defendant was defendant, by which decree it was ordered that defendant should pay plaintiff the said sum.

- (1) Plea, that the decree was made in respect of matters of trust and executorship accounts, not cognisable in a court of law. *Held* bad, debt being maintainable at law on a decree of a colonial court of equity simply ascertaining a balance and ordering payment by defendant to plaintiff.
- (2) Plea, that plaintiff sued in the Supreme Court as widow of H., in right of H., without showing any right of representation to warrant such suit, and that the decree was made on matter of complaint solely in right of H. *Held* bad, because whatever constituted a defence in that court ought to have been there relied on; and because this court would assume that right had been done there, unless something appeared to have been done repugnant to natural justice.
- (3) Pleas, showing a set-off for debts from H., or his estate, to defendant. *Held* bad; because the plaintiff sued in her own right in this court, and the defence, if available at all, was one which ought to have been made in the Supreme Court.

DEBT. The declaration charged that defendant was indebted to plaintiff in 8883*l.* 6*s.* 8*d.*, upon and by virtue of a certain decree and sentence before then, to wit on, &c., made in and by her majesty's Supreme Court of Newfoundland, in a certain matter and cause then depending in the said court, on the equity side of the said court, wherein the now plaintiff and certain other persons, to wit, &c., (naming three others,) were plaintiffs, and the now defendant was defendant; by which said decree and sentence it was ordered and decreed that the now defendant should pay to the now plaintiff a large, &c., to wit, the said sum of 8883*l.* 6*s.* 8*d.*, sterling money of Great Britain:

*289] That (a) the said *Supreme Court of Newfoundland, during all the time that the said matter and cause was depending therein as aforesaid, and continually until and at the time of making and giving the said decree and sentence as aforesaid, was, and was duly holden, within the jurisdiction thereof, in parts beyond the seas, that is to say at Newfoundland aforesaid; and the said decree and sentence was made and given at a place within the jurisdiction of the said court, that is to say at Newfoundland aforesaid, by the chief judge and other judges of the said Supreme Court, that is to say by, &c., (naming the chief judge and two assistant judges:) That the said sum is still wholly unpaid and unsatisfied to plaintiff, although a reasonable time from the making of the said decree, for the payment of the said sum, had elapsed long before the commencement of this suit: and which said order and decree still remains in force and effect, not in anywise reversed or set aside or otherwise vacated. Whereby an action, &c. Yet defendant hath not paid, &c.

(a) The allegation following was inserted as an amendment, an objection having been taken that the jurisdiction did not sufficiently appear. Reference was made to note (2) to *Pitt v. Knight*, 1 Wms. Saund. 92, and *Walker v. Witter*, 1 Doug. 1; and also to *Church v. The Imperial Gas Light and Coke Company*, 6 A. & E. 846, 857, as to the intendment, from the style of the court, that it was the court created by stat. 5 G. 4, c. 67.

Plea 4. That the said decree and sentence was made for and in respect of matters of trust and executorship accounts, and of matters not cognisable in a court of law. Verification.

6. That the said decree and sentence was founded upon a certain bill filed in the said court; and that, by the said bill, (to wit the original bill,) the plaintiff sued as Elizabeth Henderson, widow of Jordan Henderson, deceased, as such widow in right of the said deceased, without showing, nor did there appear to be, any right of representation either in herself or either of the other plaintiffs, or in any other person, to warrant such suit; *and that such decree was made upon matters of complaint solely [*290 in right of the said deceased. Verification.

8.(a) That the sum ordered and decreed by the said decree and sentence to be paid by defendant to plaintiff was for and in respect of a right claimed and asserted by and on behalf of plaintiff through and in right of her late husband J. H., deceased, and in no other right; that the said J. H., before and at the time of his death, was indebted to defendant in 10,000*l.* for money before then lent and advanced by defendant to J. H. at his request; and in, &c., (10,000*l.* for money paid by defendant for J. H., 5000*l.* for interest due from J. H. to defendant, 10,000*l.* for money had and received by J. H. to defendant's use, and 10,000*l.* on an account stated between J. H. and defendant;) which said sums of money all remained due and unpaid to defendant at the time of the commencement of this suit, and still remain due and unpaid; and which said sums exceed the amount directed to be paid by defendant by the said decree and sentence; and out of which sums defendant is ready and willing, and hereby offers, to set off and allow the amount so directed. Verification.

9. That the sum ordered was for a right claimed by plaintiff in right of J. H., and in no other right, (as in the eighth plea,) and for and in respect of a matter and cause cognisable only in a court of equity: that, during the lifetime of J. H., he and defendant carried on business in partnership together; that such partnership continued down to the time of the death of *J. H.; and that, at the time of the death of J. H., there was due [*291 from him to defendant, for and in respect of the several matters and accounts of the said partnership, a sum exceeding the amount directed to be paid by defendant by the said decree and sentence, to wit 10,000*l.*; out of which said sum the defendant is ready, &c., (as before.)

10. Allegations, as in the ninth plea, as to the right in which plaintiff claimed in the Supreme Court, and as to the partnership down to the death of J. H. That, after the death of J. H., the said business, formerly the partnership business, was carried on by defendant for his benefit and that of persons entitled, as representing J. H., to his share and interest therein; and that such business was so carried on after the death of J. H. by defendant as an accounting party, and a party liable to be called on to account for and in respect of the said business and the accounts relating thereto.

(s) The seventh plea was demurred to, and was abandoned by the defendant's counsel.

that, before and at the time of the making of the said sentence and decree, there was justly due to him, upon the accounts in respect of the several matters aforesaid, a sum exceeding the sum ordered to be paid by the said sentence and decree, to wit 10,000*l.*; and the said sum has ever since remained, and still is, unsatisfied; out of which said sum the defendant is ready, &c., (as before.)

Demurrer to the above pleas, assigning causes which, so far as they are material to the decision, will sufficiently appear from the argument.

The demurrer was argued in Michaelmas term, 1843.(a)

*292] *Sir *W. W. Follett*, solicitor-general, for the plaintiff. The fourth plea assumes that an English court of law cannot entertain an action on the decree of a colonial court of equity. But in *Henley v. Soper*, 8 B. & C. 16, it was decided that debt was maintainable on a decree of the then supreme court of judicature in Newfoundland, in a suit between partners. In *Russell v. Smyth*, 9 M. & W. 810, it was held that assumpsit might be maintained on a decret made by the lords of council and session in Edinburgh.

The sixth plea impeaches the propriety of the decision of the colonial court, which cannot be done in this form.

The eighth, ninth and tenth pleas allege a set-off for a debt due from the deceased husband. But it does not appear from the record that the plaintiff sues here in any right but her own, although the husband is named.

Barstow, contra. As to the fourth plea. The Supreme Court is established by a statute of the United Kingdom, 5 G. 4, c. 67: therefore it is not like a foreign court, but is in the same legal condition as the Court of Chancery in Ireland. The only distinction is that the appeal does not lie to the same tribunal.(b) In *Carpenter v. Thornton*, 3 B. & Ald. 52, it was held that debt could not be maintained on the decree of an English court of equity. In *Henley v. Soper*, 8 B. & C. 16, the decree was on the law side of the Supreme Court, as appears by the report of the case in Manning and Ryland's Reports, where the proceedings are set out, including a *fi. fa.*(c)

*293] **[Lord DENMAN, C. J. Sect. 16 of stat. 5 G. 4, c. 67, seems to give the same execution there in suits in equity as in actions at law.]* The form of compelling appearance is the same in each case: but the clause does not show that the process of execution is the same. A dictum in *Sadler v. Robins*, 1 Campb. 253, is, to a certain extent, in favour of the plaintiff. There the High Court of Chancery in Jamaica had ordered money to be paid after deducting therefrom costs to be taxed; and the costs had not been taxed. Lord ELLENBOROUGH decided that assumpsit could not lie on the decree; but he said: "Had the decree been perfected, I would have given effect to it, as well as to a judgment at common law." But it appears from *Henley v. Soper*, 8 B. & C. 19, 20, that at one time, a

(a) November 10th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, *4*

(b) Sect. 20.

(c) 2 M. & RyL 153, 164.

doubt prevailed whether courts of equity had the power of enforcing the decrees of colonial courts of equity: that doubt is removed, in effect, by *Houlditch v. Donegal*, 8 Bligh, N. S. 301. If any remedy lie in the courts of this country, it is an equitable one.

As to the sixth plea. In *Houlditch v. Donegal*, 8 Bligh, N. S. 301, it was held that the Irish Court of Chancery, when called upon to enforce a decree of the English Court of Chancery, might inquire into its propriety [Lord DENMAN, C. J. The conclusiveness of the proceeding in the first court seems to be decided by Vice-Chancellor SHADWELL, in *Martin v. Nicolls*, 3 Sim. 458.] That decision was disapproved of by Lord BROUGHAM, C., in *Houlditch v. Donegal*, 8 Bligh, N. S. 342: and *Hamilton v. Houghton*, 2 Bligh, O. S. 169, is an earlier authority for submitting the first proceeding to examination before acting upon it in a *second. [*294] Now the sixth plea alleges that the plaintiff sued, in the Supreme Court, in right of her husband without showing herself entitled to represent him. A payment to her would be no protection against a claim by a rightful administrator of the husband. In 2 Williams on Executors, 1501, (3d ed.) part v. book 1, ch. 2, it is laid down that, although an administrator may file a bill before he has taken out letters of administration, the bill must allege that the administrator has obtained letters; for which *Humphreys v. Ingledon*, 1 P. Wms. 752, is referred to.

As to the eighth, ninth, and tenth pleas, the defendant relies, not on a statutable set-off, but on the allowance which courts of equity have always made in the case of cross claims. If the court takes upon itself to give effect to the decree of a court of equity, it must also allow the equitable defence. [Lord DENMAN, C. J. That defence, if good, was available in the colonial court.] The defendant had there no locus standi. [Lord DENMAN, C. J. There might be an injunction now.] The cases on equitable set-off are commented upon in the judgment of Lord COTTENHAM, C., in *Rawson v. Samuel*, 1 Cr. & Phill. 161, 178. It appears that such a set-off will not be allowed unless it arise on the same transaction as the claim, and be ascertained. Here the pleas do show that the cross claims occurred in the course of the partnership; and the demurrer admits the truth of the cross claims. If the plaintiff can clothe herself with the representative character, then the defendant is entitled to set off a claim to which, in that character, she would be liable.

*Sir W. W. Follett, solicitor-general, in reply. As to the first plea: it is not clear that a court of equity here would enforce such [*295] a decree as this. It should seem that the English Court of Equity would interfere only where the decree of the colonial court ordered something to be done for which equity alone could provide, as in *Houlditch v. Donegal*, 8 Bligh, N. S. 301. It is said that *Henley v. Soper*, 8 B. & C. 16, was a case on the law side of the Newfoundland court: if so, the law there differs from the law of this country; for the claim was on a partnership account.

As to the sixth plea: whatever defence there is should be a defence which is good by the law of the country where the original proceeding takes place. The principle is correctly laid down in *Philips v. Hunter*, 2 H. Bl. 402, 410. The proper form of investing a party with representative rights may differ in the two countries: the very distinction between representative and individual rights may be unknown to the colonial tribunal. Even if the decree could be impeached, the plea ought to show that the defects alleged therein are fatal by the law of Newfoundland.

As to the pleas of set-off. If there be a set-off raising an equity here, the proper course would be to apply for an injunction: that was done in *Martin v. Nicolls*, 3 Sim. 458. At any rate, it should appear that the law of Newfoundland allows the set-off here claimed. As far as this record is concerned, the plaintiff sues in her own right; and no set-off for a debt due from her husband is good as against her. *Cur. adv. vult.*

*296] *Lord DENMAN, C. J., in this term, (May 31st,) delivered the judgment of the court.

This was an action brought on a decree of the equity side of the Supreme Court of Newfoundland, to recover the sum of 8883*l.* 6*s.* 8*d.*, awarded thereby to be paid by the defendant to the plaintiff.

This statement requires us to decide the general question whether such action can be maintained; the objection being that a decree for payment of money by a court of equity is not a declaration that the plaintiff has any legal right to the money, but only that, upon certain views peculiar to that court, the payment ought to be made.

On a former occasion, this objection was strongly felt by two of our most experienced lawyers, BAYLEY and HOLROYD, Js., who thought also that no promise to pay could be implied from a decree *in invitum*; Lord TENTERDEN and BEST, J., acquiesced; the case (*Carpenter v. Thornton*, 3 B. & Ald. 52) being that of a decree, by the vice-chancellor of England, for the payment of money which appeared to be made on equitable obligations only. On the other hand, Lord ELLENBOROUGH's opinion is clear, in *Sadler v. Robins*, 1 Campb. 253, that he ought to give the same effect to a decree of a foreign court of chancery as to a judgment at common law. We have also a decision in *Henley v. Soper*, 8 B. & C. 16, where the decree of a colonial court of chancery in a partnership suit, which resulted in a clear balance due from the one to the other, was held to support an action of debt for that balance. There Lord TENTERDEN does not appear to be entirely satisfied with the case of *Carpenter v. Thornton*, 3 B. & Ald. 52.

*297] *BAYLEY, J., attempts to distinguish it in a manner not very satisfactory. HOLROYD, J., says that he should have felt much doubt, but for Lord ELLENBOROUGH's dictum in *Sadler v. Robins*, 1 Campb. 253. LITTLEDALE, J., saw no objection to giving full effect to the decree. This latter case was in some degree impugned at the bar, because part of the reasoning of Lord TENTERDEN is at variance with what has been more recently decided in the House of Lords. He thought it necessary for a court

of law to act on the decree, because he believed that our Court of Chancery would decline to enforce it; but such is not the law; for the House of Lords has decided that the Irish chancery ought to entertain a bill founded on the decree of the English Court of Chancery, for the purpose of giving effect to it in regard to Irish property; *Houlditch v. Donegal*, 8 Bligh, N. S. 301. But we do not think Lord TENTERDEN's general reasoning destroyed by the failure of that argument. The power of the Court of Chancery may exist without excluding that of other courts capable of giving a remedy as complete and much more expeditious. The decrees of foreign courts of equity may indeed, in some instances, be enforceable no where but in courts of equity, because they may involve collateral and provisional matters to which a court of law can give no effect; but this is otherwise where the chancery suit terminates in the simple result of ascertaining a clear balance, and an unconditional decree that an individual must pay it. The circumstances by which the court arrives at that conclusion do not affect the right of suing in a court of law, which grows out of the legal duty to pay. An award to pay money, made under a submission to a reference, may possibly be founded exclusively *on equitable considerations; but the parties bound to perform it owe the money. We cannot think that [*298 their previous consent to be so bound makes a stronger obligation than that of every subject of the state to perform the duties imposed on him by a court of justice, exercising lawful jurisdiction over him. A judgment for unliquidated damages in respect to an action of tort is equally *in invitum*, and may equally be said to form no debt till the court has adjudged to the plaintiff his damages; but, when so adjusted, they are recoverable as a debt.

Several pleas were pleaded to show that the defendant had not had justice done him in the Court of Chancery at Newfoundland. This is never to be presumed; but the contrary principle holds, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, are repugnant to natural justice: and this has been often made the subject of inquiry in our courts. But it steers clear of an inquiry into the merits of the case upon the facts found: for whatever constituted a defence in that court ought to have been pleaded there; an observation which disposes of all the special pleas, not only those which rely on the want of a representative title in the plaintiff though she sued in a representative right, but also the pleas of set-off. For these last, as the parties stand described on this record, are clearly unavailing; the plaintiff is suing in her own right on a decree obtained in her own right: the set-off can only be maintained on the ground of an alleged defect in the plaintiff's title in the former suit, which ought to have been made the ground of defence there. If that suit was well decided, which we must now take it to have been, these pleas are *bad. This is by no means inconsistent with *Smith v. Nicolls*, 5 New Ca. 208, where the Court of Common [*299 Pleas held that the plea of judgment recovered in a colonial court, not

of record, in the defendant's absence, followed by no execution, was not a bar to the plaintiff's recovering for the same cause of action in our courts. But no opinion was intimated that the question decided by the colonial court between parties properly brought before it was open to examination in an action brought on its judgment here. Circumstances may indeed exist which would render it unconscientious and inequitable to claim the sum which the court has decreed to be paid. But the same might be true of any sum recovered by the judgment of the highest court, or of any debt whatever. In such case the remedy is by a proper application to the court of Chancery, which has ample means of preventing the wrong from being effected by the iniquitous enforcement of a legal right.

We do not find it necessary to weigh the opinion of this court in *Carpenter v. Thornton*, 3 B. & Ald. 52, against that in *Henley v. Soper*, 8 B. & C. 16, or decide that an action will, under any circumstances, lie in this Court on a decree of the High Court of Chancery. That point may perhaps still be open to fuller consideration when the question is raised. But we agree with Lord ELLENBOROUGH's opinion in *Sadler v. Robins*, 1 Camp. 253, and observe with satisfaction that the Court of Exchequer (in *Russell v. Smyth*, 9 M. & W. 810,) acted in conformity with our present decision, which is that the plaintiff is entitled to judgment. Judgment for the plaintiff.

*300]

*ANN HAWORTH v. ORMEROD.

On application, under stat. 4 & 5 W. 4, c. 62, s. 27, to a superior court in Westminster Hall for a new trial of a cause in the Common Pleas at Lancaster, the recognisance, "to make and prosecute such application," is satisfied by obtaining a rule nisi, whatever afterwards becomes of the rule.

ERROR from the Court of Common Pleas at Lancaster.

The plaintiff in error declared, in the Court of Common Pleas at Lancaster, as administratrix of Richard Fletcher the elder, deceased, in debt. For that, whereas heretofore, to wit 17th August, 1840, at a session of assizes holden at Liverpool, before Sir THOMAS COLTMAN, Knight, one of the justices, &c., and Sir ROBERT MOUNSEY ROLFE, one of the barons, &c., justices of the said lady the queen at Lancaster, in a certain cause then pending in the Court of Common Pleas there, wherein the said Ann Haworth, administratrix as aforesaid, was plaintiff, and one Richard Fletcher the younger was defendant, the said Richard Ormerod came into the said court, and, by the name and description, &c., acknowledged to owe to the plaintiff in the said cause, by the name and description, &c., administratrix, &c., the sum of 90*l.*, being such as the court there then thought fit to be paid to the plaintiff, by the name and description aforesaid, if the said R. F. the younger should not make and prosecute an application by motion to her majesty's Court of Exchequer at Westminster to set aside the verdict found for the plaintiff in that cause, and should not also satisfy and

pay (if such application should be refused) the debt or damages and costs adjudged and to be adjudged in consequence of the said verdict, and all costs and damages to be awarded for the delaying of execution thereon; as by the record of the said *recognisance, &c. And, although the said R. F. the younger afterwards, to wit on 3d November in the year aforesaid, did make an application by motion to her majesty's Court of Exchequer at Westminster to set aside the said verdict, and the said Court of Exchequer thereupon did then make and grant a rule to show cause why the said verdict should not be set aside and a new trial had; yet afterwards, to wit 31st July, 1841, it was ordered by the said Court of Exchequer that the said rule should be discharged, and the same was then discharged accordingly, and the said application was then by the said court refused: and thereupon afterwards, to wit on 27th November, 1841, by the consideration and judgment of the said Court of Common Pleas at Lancaster, the said plaintiff recovered against R. F. the younger 12*l.* 1*s.* 10*d.*, which in and by the said last mentioned court were adjudged to the said plaintiff, &c., for her damages which she had sustained by reason of his non-performance of certain promises in the declaration in the said suit mentioned, and for the costs and charges by her, &c., whereof the said R. F. the younger was convicted, as by the record, &c. Which said sum of 12*l.* 1*s.* 10*d.* is still wholly unpaid and unsatisfied unto the said plaintiff; whereby, &c., an action hath accrued, &c. [*301]

Plea. That, after the granting of the said rule to show cause, &c., and before the making of the said order in the declaration mentioned, to wit 30th January, 1841, to wit in Hilary term, 4 Victoria, the said R. F. the younger, in the said Court of Exchequer, prosecuted his said application by motion to her majesty's said Court of Exchequer to set aside the verdict found for the plaintiff in the said cause: *and the said Court of Exchequer, on the application of the said E. F. the younger, then ordered the said verdict to be set aside; and the said court further ordered that a new trial should and might be had on payment of costs: and so defendant says that the said application of the said R. F. the younger was then and there granted by the said court, and the condition of the said recognisance performed and satisfied. Verification. [*302]

Replication. That true it is that her majesty's Court of Exchequer at Westminster, after the granting of the rule to show cause in the said plea mentioned, to wit on the day and year in the plea lastly mentioned, upon the application of R. F. the younger, by a rule of the said court ordered that the verdict in the said plea mentioned should be set aside, and a new trial had, as in the said plea alleged, yet, for replication to the said plea, plaintiff saith that the said application of R. F. the younger was granted, and the last mentioned rule made by the court, conditionally only upon payment of costs; and, because the said costs were not afterwards or at any time paid, the said court afterwards, to wit 31st July, 1841, to wit in Trinity term, 4 Victoria, by a rule of the said court, rescinded the rule here-

inbefore last mentioned, and discharged the rule to show cause above and in the said plea mentioned, as in the said declaration is above alleged and stated. Verification.

General demurrer and joinder.

Judgment having been given for the defendant below in the Court of Common Pleas at Lancaster, error was brought in this court. The case was argued in last Easter term.(a)

*303] **Archbold*, for the plaintiff in error, (the plaintiff below.) A breach of the condition of the recognisance appears on the record. It is not, indeed, alleged that the present defendant has not paid the sum for which he bound himself in the recognisance; but, if the condition of the recognisance be broken, it lies on the defendant here to show that he has paid the sum in the recognisance: that is so in an action on a bond; *Ashbee v. Pidduck*, 1 M. & W. 564, S. C. Tyrwh. & Gr. 1016. The question then arises whether the application to set aside the verdict in the original action has been "refused" within the meaning of this recognisance and of stat. 4 & 5 W. 4, c. 62, s. 27. Sect. 26 of that statute enables parties to actions in the Court of Common Pleas, at Lancaster, to apply by motion to the superior courts at Westminster, for a rule to show cause why a new trial should not be granted, &c.; and the superior court is "authorized and empowered to grant or refuse such rule;" and sect. 27 enacts that judgment and execution shall not be staid unless the party "intending to apply for such rule" shall be bound by recognisance "to make and prosecute such application as aforesaid, and also to satisfy and pay, if such application shall be refused, the debt, or damages and costs adjudged," &c., in consequence of the verdict or nonsuit, "and all costs and damages to be awarded for the delaying of execution thereon." The object of this clause is like that of stat. 6 G. 4, c. 96, "for preventing frivolous writs of error," s. 1;(b) and the recognisance under the statute last mentioned is conditioned *204] that the party to the original action "prosecutes his writ of error **with effect*, and if judgment be affirmed, shall satisfy and pay the damages," &c.; Tidd's Pract. Forms, 528, (8th ed.) The meaning of the word "refused," in stat. 4 & 5 W. 4, c. 62, s. 27, is "refused ultimately;" and "prosecute" must mean "prosecute with effect;" that is, not unsuccessfully. Such has been the construction on bonds in replevin; *Perrett v. Beavan*, 5 B. & C. 284; *Jackson v. Hanson*, 8 M. & W. 477.(c) In *Hodson v. Richardson*, 3 Burr. 1477, the defendant in an insurance cause agreed to be bound by the verdict to be given in another insurance cause; and the plaintiff in the latter obtained a verdict: but, a rule having been made absolute for a new trial of this latter cause, the court refused to compel the defendant in the first mentioned cause to pay money under his agreement, saying that the agreement meant "such a verdict as the court thinks

(a) April 30, 1844. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Jc.

(b) Referring to stat. 3 Ja. 1, c. 8, which prescribes the form of recognisance.

(c) See *Morris v. Matthews*, 3 Q. B. 293.

ought to stand as a final determination of the matter." Here, as appears by the replication, the rule for a new trial was made absolute only on payment of costs: if, in such a case, the costs be not paid, the original verdict will stand good, just as, where a rule for a criminal information is discharged upon payment of costs, the information may be filed if the costs be not paid.

Cowling, *contra*. The condition of the recognisance has been fulfilled. Stat. 4 & 5 W. 4, c. 62, was passed "for improving the practice and proceedings in the Court of Common Pleas" at Lancaster: and the object of sect. 26, was to give the party applying for a new trial the advantage of being heard before a full court in Westminster Hall, instead of the two judges only who had been in the commission for Lancaster. But, *as this might give an opportunity to the losing party to interpose [*305 delay on frivolous grounds, the twenty-seventh section was added, to ensure the making of the application and the payment of the damages, &c., in case the court applied to shall, by refusing the rule nisi, decline to entertain the application. When the application for the rule nisi is made, and acceded to, that satisfies the intention of the legislature, and the words of the statute. The words at the end of sect. 27, "delaying of execution thereon," refer to the delay caused by the application for the rule nisi. Where the cause originates in the superior courts of Westminster Hall, the party who has succeeded at nisi prius has, after a rule nisi has been granted, no security for obtaining the fruits of his verdict if he ultimately keep it; and the legislature appears to have intended that, after the rule nisi was obtained in a cause originating in the Common Pleas at Lancaster, the proceedings should be on a footing analogous to that on which other proceedings are. The words in sect. 27, "if *such* application shall be refused," refer to the words in sect. 26, "to apply by motion" "for a rule to show cause." The analogy of replevin bonds is against the plaintiff; there the words are "prosecute with effect;" and so they are in recognisances under stat. 6 Geo. 4, c. 96, s. 1: but here the words "with effect" are omitted, evidently by design. In actions of replevin it is necessary to provide that the party shall, if successful, get back the goods already in his hands: on writs of error, the judgment of one court having already been obtained, it is fit that the party who has been successful so far shall not be delayed, unless it turn out that a mistake was committed by that court. In sect. 26, it is provided that "the court in Westminster Hall, on determining the merits of the rule, may "make such orders thereupon as the same court shall [*306 think proper:" it cannot have been intended that the surety should guarantee the compliance with such orders, whatever they may be. Further, the rule here has been made absolute, and that not, properly speaking, conditionally; the rule making the rule nisi absolute was not rescinded till two terms after it was made.

Archbold in reply. The payment of costs was clearly a condition annexed

to the rule absolute for a new trial; there are no other means for obtaining such costs: an attachment would not be granted for not paying them.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (May 31st,) delivered the judgment of the court.

This was an action of debt on a recognisance given to the plaintiff in error by the defendant in error, under stat. 4 & 5 W. 4, c. 62, s. 27; and the question is as to the meaning of the statute on the recognisance.

The twenty-sixth section of the statute enables any party in an action in the Court of Common Pleas at Lancaster, to apply to any one of the superior courts at Westminster for a rule to show cause why a new trial should not be granted: it then enables such court to grant or refuse such rule, and afterwards to hear and determine the merits thereof. The twenty-seventh section provides that judgment and execution shall not be stayed unless the party become bound in recognisances with two sureties to make and prose-

•307] cute such application as aforesaid, and also to satisfy and pay, if such application should be refused, the debt and costs.

It appears by the declaration in this case that a rule nisi for a new trial was granted, which was afterwards discharged. The subsequent pleadings show that it was at first made absolute on payment of costs; but, as they were not paid, it was subsequently discharged. The recognisance is in the very words of the twenty-seventh section. The plaintiff in error contends that the discharge of the rule nisi is the same thing in effect as a refusal to grant it, and that the true construction of the act is to treat the recognisance as conditional to pay the debt in the event of a new trial being ultimately refused. The defendant in error insists that the recognisances were satisfied by the granting of the rule nisi.

We are of opinion that the defendant's construction is right. The twenty-seventh section directs the condition to be to make and prosecute "such application as aforesaid," and to satisfy and pay the debt "if such application shall be refused." What application is that? The twenty-sixth section gives the right to apply for a rule to show cause; that is the only application mentioned. The words "such application," in the twenty-seventh section, must therefore be read as if they had been "the said application for a rule to show cause." If the legislature intended more, we can only say that, according to our opinion, they have not expressed it; and the judgment of the court below must be affirmed. Judgment affirmed.

TRINITY VACATION.(a)

[*308

KEIR v. F. LEEMAN and PEARSON.

The law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action; but, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

Therefore, although the party injured may lawfully compromise an indictment for a common assault, an agreement to pay the costs of a prosecution for assault on plaintiff and riot, and of an action for wrongful entry under a *fi. fa.*, which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution under the *fi. fa.*, is altogether invalid, as grounded on an illegal consideration.

Although the compromise of the prosecution was entered into with the leave of the judge before whom the indictment came on for trial.

ASSUMPSIT. The declaration stated that, before the making of the promise of the defendants, George Emmitt was indebted to plaintiff in 150*l.*, for the recovery of which plaintiff had brought an action in the Queen's Bench, and by the judgment of the court recovered his damages, &c., and thereupon, &c., sued out a writ of *fi. fa.*, directed, &c., (setting out the writ;) which writ was duly endorsed, &c., and was delivered, &c.; by virtue of which writ the sheriff had made his warrant in writing, directed, &c., (setting out the warrant;) which warrant was delivered to one Acton to be executed, &c.; and thereupon, by virtue of the warrant and writ, Acton had entered upon a farm and into a messuage and dwelling house of George Emmitt, situate, &c., and had seized, &c., and, Acton so being in possession, one William Emmitt, claiming title to the farm, messuage, dwelling house, goods and chattels, crops and effects, as his own property, had, together with divers other persons, to wit, George Emmitt and five others, (naming them,) assaulted Acton and his followers and assistants, and forcibly and violently ejected and expelled him *and his followers and assistants from the messuage and dwelling house, and from the possession of divers of the goods and chattels so seized and taken, and had kept and detained the same in the dwelling house, and by means of shutting the outer door, excluded Acton from the dwelling house, and from the possession of the goods and chattels so kept and detained, until Acton, in order to retake possession by virtue of the warrant, had necessarily and unavoidably a little broken the outer door, and had thereby re-entered and retaken the goods and chattels in the dwelling house being so kept and detained. That thereupon afterwards, and before the making of the promise, &c., William Emmitt had commenced an action of trespass in Q. B., against the sheriff and Acton for the said entry into the messuage and dwelling house, and the said seizing, &c.; and the sheriff, &c., appeared and pleaded certain pleas, (particularizing them,) which led to certain issues,

(a) The court sat in banc on June 24th, and the three following days, and on July 6th.

(describing them;) and thereupon the issues had come on to be tried at the Summer assizes for Yorkshire, A. D. 1842; and, upon the trial, William Emmitt had set up an assignment by George Emmitt, of all his estates and effects to trustees, by whose transfer and conveyance to him, William Emmitt, he claimed title to the same: but it was insisted by the sheriff and Acton, at the trial, that the assignment was not *bonâ fide* but fraudulent and void. That, the question having been left to the jury, their verdict just before the making of the promise by the now defendants had been returned for William Emmitt on the first issue, (Not guilty,) and the sheriff, &c., on the other issues. That, after the entry of Acton into the messuage and dwelling house, and the assaulting, ejecting, expelling, and excluding, &c.,

*310] (by the parties above stated,) *and before the making of the promise by the now defendants, a certain indictment against William Emmitt, George Emmitt, and, &c., (five others, naming them,) for riotously assembling to disturb the peace, and for assaulting Acton and his followers, &c., on the occasion, &c., (above mentioned,) had been preferred by the now plaintiff by his attorney, &c.; and the indictment, having been found at the Yorkshire Lent assizes, A. D. 1842, stood for trial at the said Summer assizes for the said county; and the prosecutor was then and there, after the trial and verdict in the said cause, and at the time of the making the promise, &c., about to proceed further on such indictment, and to try the same, and adduce and offer evidence in support thereof. That, before and at the time of the making the promise by the defendants, the sheriff and his bailiff were and had been and continued in possession of the crops and effects so seized as aforesaid, &c., by virtue of the warrant and execution, &c.; and, subject to the said execution, and possession thereby, the said William Emmitt was and had been and continued in possession of the same; and divers costs and charges had, before and at the time of the making of the promise by the defendants, been incurred in and about the seizing and remaining in possession, &c.; and a large balance of the costs and charges and of the principal money, damages and costs recovered against George Emmitt remained unsatisfied, &c. That, before and at the time of the promise by the now defendants, the action by William Emmitt against the sheriff, &c., had been and was defended by, &c., as the attorney therein in the name of the sheriff and bailiff, but under the indemnity, and on the retainer, and at the costs and expenses, of the now plaintiff; and divers

*311] large costs *and charges had been incurred and were due to such attorney about the defence of the last mentioned suit. That, before and at the time of the promises by the now defendants, the said prosecution and indictment had been preferred and conducted by the said attorney on the retainer and at the costs and expenses of the now plaintiff, and divers large costs and expenses had been and were incurred and were due to the attorney in and about the said prosecution, &c., for the said riot and assault, of all which several premises, &c., (notice to defendants.) And thereupon afterwards, to wit on, &c., in consideration that the prosecutor (to wit the

now plaintiff) of the indictment against George Emmitt and others (naming them) would, to wit at the request of the defendants, not proceed further on such indictment, and of the sheriff of Yorkshire withdrawing, to wit by and with the consent and direction of the now plaintiff at the request of the now defendants, from the possession of the crops and effects at the farm under an execution against George Emmitt at the suit of the now plaintiff, the now defendants undertook and promised the plaintiff to pay him, on or before the last day of Michaelmas term next thereafter, the balance of the principal money and costs then remaining unsatisfied in the original cause, to wit, *Keir v. George Emmitt*, and the balance of costs and charges incurred in and about the execution of the warrant of *fi. fa.* issued in the same cause. And the now plaintiff avers that, confiding in the promise, &c., the prosecutor of the indictment, to wit the now plaintiff, did not proceed further on such indictment; and that afterwards, to wit on the day and year last aforesaid, at the said Summer assizes and sessions of oyer and terminer, &c., then holden for the *county of York, &c., before, &c., in and for the said county, the said prosecutor of the indict- [*312 ment did, by and with the assent of the said Acton and his followers and assistants, instruct counsel to inform, and by such counsel did inform, the said justices so assigned, &c., in open court, at the said assizes and sessions, of and concerning the premises, and did then and there, by and with the assent and leave of the court, thereupon forbear to proceed further and to offer any evidence upon the said indictment; and thereupon the said persons so indicted, &c., were in due form of law by a jury of the said county acquitted of the premises in the indictment charged upon them; of which, &c., (notice to defendants.) And the plaintiff avers that he, confiding, &c., did forthwith withdraw the said execution, to wit the writ and warrant against George Emmitt, and gave notice to the sheriff of Yorkshire and his bailiffs to withdraw, and they immediately did withdraw, from the possession of the crops, &c.; of which, &c., (notice to defendants.) That the balance of the principal money and costs so recovered, &c., at the time of the making the promise by the defendants remaining unsatisfied, amounted to 84*l.* 12*s.*, of which, &c., (notice;) and that the balance of the costs and charges of the execution, unsatisfied at the time of the defendants' promise, was 63*l.* 11*s.* 11*d.*; of which defendants had notice, and were requested to pay the several sums, &c.: yet they had disregarded their promise, and had not paid, &c.; whereby the plaintiff had lost the balance of the principal money and costs recovered against George Emmitt, and had become liable to pay and had paid the balance of the costs and charges incurred in and about the execution of the warrant.

*The second count, after setting out the same matters as the first, and the same consideration for the promise of the defendants, alleged [*313 the promise of the defendants to be to pay the attorney the costs, as between attorney and client, of the defendants in the suit of *Emmitt v. Wentworth*

and Acton, (the sheriff and his bailiff,) and concluded with similar averments and breach.

The third count laid the same consideration for the promise, but stated the promise to be to pay the attorney the costs as between attorney and client of the prosecution against George Emmitt and others for riot and assault, with similar averments and breach.

The defendants pleaded several pleas; the second of which, pleaded to the first count of the declaration, set out the indictment, which, in fifteen counts, charged the parties indicted with riot and assault, assault on a sheriff's officer in the execution of his duty, assaults upon persons then acting in aid of a peace officer in the due execution of his duty, with intent to resist the apprehension of the then defendants for an offence for which they were liable to be apprehended, (to wit for having riotously assembled and assaulted, &c.,) riotous assemblies and assaults, a riot and assault with intent to prevent the apprehension of the then defendants for an offence, &c., riotous assemblies, and common assaults. The plea concluded: "and so the defendants say that the said consideration for the said supposed promise in the said first count mentioned was and is illegal, and such supposed promise was and is wholly null and void." Verification. The fourth and eighth pleas, pleaded respectively to the second and third counts, were, that the indictment in these counts respectively mentioned was similar to *314] that set out in the first *plea, and that therefore the consideration for the supposed promise was illegal, and null, and void: concluding with verifications.

Demurrer to all the pleas. Joinder.

The points for argument stated by the plaintiff were, that the pleas contain no answer to the declaration, nor show any cause why the consideration for the promise in the respective counts is, by the common law or by statute, illegal, and the promise null and void; that neither the offence stated in the counts to have been committed, nor the indictment stated therein to have been preferred, and set out in the pleas, are of such a nature as to make the consideration of the plaintiffs not proceeding further in the indictment an illegal consideration for the promises, it being averred in the counts, and not denied by the pleas, that the not proceeding further in the indictment was by the assent and leave of the court, obtained after the justices there had been informed of the premises in those counts respectively stated: that it is not averred by the pleas, nor does it appear by the counts, that it was legally or morally the duty of the plaintiff, or that he was under any obligation of recognisance, subpoena or otherwise, to proceed further on the indictment, or that his testimony was required, or could be used, in any such further proceeding, or that he had any connexion with the offence, or the prosecution, except that it was conducted at his expense, and that the consideration of such a prosecution not proceeding was not an illegal consideration: that, if the consideration of the plaintiff not proceeding further

in the indictment be insufficient, it is only part of the consideration averred, and that the residue, namely the withdrawing the fi. fa., *is sufficient to support the promise laid in each of the counts; that the consideration may be divisible, and that part, if insufficient, namely the not proceeding further in the indictment, may be applied only to the promise in the last count, namely to pay the costs of that prosecution; and that the sufficient part of the consideration, namely the withdrawing the execution, may be applied to the promises in the other two counts, namely to pay the debt and costs in the action in which the execution issued, and the costs in the action arising from the levy. [*315]

The defendants' points were, that the considerations for the promises in the declaration (as appearing upon the declaration and pleas) are illegal, and the contracts illegal and void.

The demurrer was argued, in the last term, (a) by *Bliss* for the plaintiff, and *Kelley* contra. The course of the argument and the points decided will appear sufficiently from the judgment of the court. The following authorities, in addition to those noticed in the judgment, were referred to: *Rex v. Cotesbatch*, 2 Dowl. & R. 265; *Nerot v. Wallace*, 3 T. R. 17; *Garth v. Earnshaw*, 3 Y. & Coll. 584; *Evans v. Jones*, 5 M. & W. 77; *Harvey v. Morgan*, 2 Stark. N. P. C. 17; (b) *Harrington v. Kloprogge*, (c) 1 Story on Equity, s. 294, (p. 298, 3d ed.) Chitty on Contracts, 674, 3d ed.; 4 Blackst. Comm. 363. (d) *Cur. adv. vult.*

*Lord DENMAN, C. J., in this vacation, (June 27th,) delivered the judgment of the court. His lordship, after stating the substance of the declaration, proceeded as follows. [*316]

The plea set out the indictment, and averred the illegality of such an agreement. The plaintiff demurred; and the general doctrine was largely discussed before us.

The principle of law is laid down by WILMOT, C. J., in *Collins v. Blantern*, 2 Wils. 341, 349, (e) that a contract to withdraw a prosecution for perjury, and consent to give no evidence against the accused, is founded on an unlawful consideration and void.

On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe.

(a) May 28th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

(b) See also *Kirwan v. Goodman*, 9 Dowl. P. C. 330; *Horton v. Benson*, Freem. C. B. 204; *Regina v. Gore*, 8 Dowl. P. C. 102; *Blanchard v. Lilly*, 9 East, 497; *Rex v. Moate*, 3 B. & Ad. 237; Stat. 18 Eliz. c. 5.

(c) Note (a) to *Palmer v. Bate*, 2 B. & B. 678.

(d) Bliss also argued that the pleas ought to have contained all the averments that would have been necessary in an indictment for compounding an offence, and were bad for not averring that any offence had been committed, and that the prosecutor had been bound over to prosecute, or was a party grieved, or was a person who could have given evidence in support of the prosecution.

(e) See 1 Smith's Lead. C. 154.

An early case occurs before Lord TALBOT, *Johnson v. Ogilby*, 3 P. Wms. 277. A bill was filed to compel performance of an agreement to pay money and assign property in consideration, among other things, of dropping an indictment for a cheat of a peculiar character. A female, who had agreed to levy a fine and suffer a recovery of some houses to the use of plaintiff, afterwards pretended that she was married at the time of the agreement, and *pleaded her marriage to the bill. The plaintiff then indicted her *317] for a cheat; and, when the indictment was ready for trial, the parties entered into this compromise. The principal question argued was whether the attorney's signature bound him personally. But the reporter says: "Then the lord chancellor started another point, (viz.) that this was a criminal prosecution; and the agreement being to stifle a criminal prosecution, was therefore not to be executed in equity. To which I answered," (says Mr. Williams,) "that it was true, in the case of a prosecution for felony, an agreement to stifle such a prosecution was not lawful; but where the indictment was for a fraud, and the party wronged by the fraud came to an agreement to be satisfied for such injury, (as in conscience he ought to be,) this was lawful, matters of fraud being cognisable and relievable as well in equity as at law: wherefore this objection was no further insisted on."

This reason is not, perhaps, very satisfactory; nor did this point apparently receive much consideration. It occurred in 1734; *Collins v. Blantern*, 2 Wils. 341, in 1767.

The doctrine was several times discussed before Lord KENYON.

In Mr. Kyd's *Treatise on Awards*, two of his decisions are reported. In 1795, an indictment against Lord Falkland, John King, and another, (a) for a conspiracy to cheat Mr. Phillips by a false representation of the ownership of certain estates on which he advanced money, and also indictments for perjury, were called on for trial at nisi prius: the defendants were acquitted *318] on the first, and (it should appear) not on the merits; after which an order was made at nisi prius for referring to arbitration all the matters in difference between the prosecutor and the defendants in the said indictments. This was done with the acquiescence of Lord KENYON. Mr. Kyd remarks on this proceeding as inconsistent with what the same judge had done in *Rex v. Coombs*, and *Rex v. Rant*, Kyd on Awards, 64, 2d ed., where cross bills of indictment for riot and assault had been preferred and submitted to arbitration; in which case the counsel "had hardly stated the fact of the submission by bond, when the court expressed a considerable degree of surprise that a criminal prosecution should be so submitted; they observed that it was usual indeed in prosecutions of this kind, before a verdict was given, or after verdict of conviction, and before sentence, for the parties to talk together by the recommendation of the court, and if they agreed, the court set a nominal fine; but the whole was done under the inspection of the court, and their sentence formally followed."

(a) *Rex v. Lord Falkland*, Kyd on Awards, 66, 2d edit. Cited in Watson on Awards, 48, note (1.) 2d ed.

Ex. Fallows v. Taylor, 7 T. R. 475, the magistrates had directed prosecutions for a public nuisance in a river; the plaintiff by their order had prepared bills of indictment against the defendant, who, in order to avoid the expense of the indictment, entered into the bond on which the action was brought, to remove the nuisance. Lord KENYON, C. J., and LAWRENCE, J., clearly held this to be a lawful consideration for the bond.

In *Drage v. Ibberson*, 2 Esp. 643, Lord KENYON said "that he should adhere to the class of cases which held, that the consideration being the settling of a misdemeanor, *might* be good in law," and nonsuited the plaintiff, who had "brought trover for a promissory note given by himself to compromise a charge. The facts of the case are not very intelligible; but the caution with which that learned judge expressed himself is worthy of observation. [*319

In *Pool v. Boufield*, 1 Camp. 55, (1807,) an agreement had been between the plaintiff and defendant to discharge the latter from liability on a bill of exchange, as an inducement not to move the court for the defendant to answer the matters of an affidavit. Lord ELLENBOROUGH held that the agreement was corrupt and invalid, and the plaintiff was entitled to recover that amount.

The case of *Edgcombe v. Rodd*, 5 East, 294, (1804,) was very singular in its circumstances. The plaintiff had been charged before justices with a misdemeanor, that of disturbing the religious worship of a dissenting congregation. He sued them for false imprisonment; and they pleaded by way of defence that they had discharged him from the imprisonment, and that the prosecutor had agreed to proceed no farther, in satisfaction of that same imprisonment. On argument this defence was properly held naught; and each of the judges declares his opinion that the agreement itself was unlawful, as an obstruction to public justice. LE BLANC, J., observes: this "was a prosecution for a public misdemeanor, and not for any private injury to the prosecutor."

Beeley v. Wingfield, 11 East, 46, was an action on a promissory note for 24l. given by a defendant to a parish officer, on whose prosecution he had been convicted at Quarter Sessions of beating his apprentice. The plaintiff had been bound over to prosecute; and the court considered this security in abatement of the period of defendant's imprisonment for the misdemeanor. The judgment of Lord ELLENBOROUGH, C. J., is [*320 as follows. "There does not seem to be any objection to the security which has been taken, either as contrary to the provisions of the statute, or to the general principle of law. The overseers got no pecuniary benefit to themselves or to the parish by taking this security, beyond the fair amount of the expenses incurred by them in bringing the defendant to justice. It did not stifle a public prosecution, or elude the public interest in bringing such an offender to justice, by way of example to others. The security in question, given with the sanction of the court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offence,

in addition to the imprisonment inflicted on him. If we had seen any ground for suspecting that the authority of the court had been used as an instrument of oppression or extortion, we should have watched the case very jealously; but nothing of that sort appears."

I happened to be both at Quarter Sessions when this note was given, and at the assizes where the case was tried; and I always felt some doubt whether the proceeding thereby sanctioned was quite correct: the principle, however, on which compromise of offences may be lawful is forcibly laid down with proper limitations. *Kirk v. Strickwood*, 4 B. & Ad. 421, is to the same effect.

In *Baker v. Townsend*, 7 Taunt. 422, the Court of Common Pleas held that, after conviction on an indictment for assault committed in relation to claim of right to land, when the defendant was brought up for judgment, the assaults, the costs of the indictment, and the disputed *right of *321] possession, and all matters in dispute, might lawfully be referred to arbitration. GIBBS, C. J., thus expressed himself. "The parties have referred nothing but what they had a right to refer. They have referred the several assaults: these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute refers all other their civil rights, which may well be referred."

The last case to be cited is *Elworthy v. Bird*, 2 Sim. & Stu. 372. Sir J. LEACH there enforced an agreement for a separation of man and wife under the circumstances, though it embraced also a compromise of indictment for assault. The doctrine was fully discussed: and the vice-chancellor concisely remarks that "all the authorities concur that the policy of the law does permit the compromise of indictments for assault, and such compromises are frequently recommended and approved by the court."

The result of the cases makes it clear that some indictments for misdemeanor may be compromised, and equally so that some cannot. The line will, as we apprehend, be found correctly traced by GIBBS, C. J., in the passage just quoted, and by LE BLANC, J., in *Edgcombe v. Rodd*, 5 East, 294.

We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

*322] "In the present instance, the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise.

The approbation of the judge (whether necessary or not) may properly be asked on all occasions where an indictment is compromised on the trial; plainly it cannot make that legal which the law condemns. But, according

to this record, the obtaining it was not made a condition of the promise, nor was it in fact obtained till after the agreement made.

So much was said in argument for the purpose of raising a doubt whether the plaintiff was prosecutor of the indictment, and had bound himself to any thing inconsistent with his public duty in withdrawing the prosecution, and forbearing to adduce evidence in support of the indictment, that we ought not to pass it over entirely. The language of the declaration and of the plea, however, requires only to be read, to show that there is no real doubt on the point.

We think the agreement invalid as founded on an illegal consideration, and that the defendants are entitled to judgment.

Judgment for defendants.(a)

(a) See *Goodall v. Lowndes*, post. (Mich. T., November 2d and 16th, 1844.)

*IN THE EXCHEQUER CHAMBER.

[*323

(Error from the Queen's Bench.)

JENNEY and RUNNACLES v. BROOK. June 24.

Plaintiff below demised land by indenture, excepting all timber, timber trees, and other trees, &c., bushes and thorns, *other than such bushes and thorns as should be necessary for the repair of the fences*; the lessee covenanted to keep the fences in repair during the term, finding all materials, except that the lessor should find rough wood for such repairs, if growing upon the premises; and the lessor covenanted during the term to provide the lessee sufficient rough timber, stakes, and bushes, if growing on the premises, for doing such repairs.

Held, dubitante POLLOCK, C. B., that the provision as to bushes and thorns necessary for repairs was not an exception out of the exception, but that all trees, bushes, and thorns were excepted out of the demise, whether part of the fences or not, or whether necessary for repairs or not; and that, on the trial of an action against wrong-doers for cutting some of the bushes and thorns, a direction by the judge, that, if they were cut by the defendants, the plaintiff was entitled to a verdict, was right, without previously putting any question to the jury whether the bushes, &c., were part of the fence, or were necessary for repairs.

Semble, that, before the lessee could take any of the thorns, &c., for repairs, they must have been assigned for that purpose by the lessor.

The Highway Act, 5 & 6 W. 4, c. 50, s. 65, enacts that, if the surveyor shall think that any carriage way is prejudiced by the shade of any hedges, or by any trees, except trees planted for ornament, &c., and that the sun and wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriage way by any hedge or tree, the owner of the land on which the hedge, &c., grows, next adjoining to such carriage way, on the surveyor's information, may be summoned before a special session, to show cause why the hedges are not cut, pruned or plashed, or such trees not pruned or lopped, in such manner that the carriage way shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriage way to the damage thereof, or why the obstruction caused in such carriage way should not be removed; and, if the justices shall order that such hedges shall be cut, pruned or plashed, or such trees pruned, &c., in manner aforesaid, or such obstruction removed, the owner shall comply within ten days after the service of the order, and in default thereof shall be subject to a penalty; and the surveyor, if the order be not complied with, is authorized and required to cut, prune or plash such hedges, and to prune, &c., such trees, for the benefit of the highway, and to remove such obstruction, to the best of his judgment, and according to the true intent of the act. By sect. 105, any person thinking himself aggrieved may appeal to the quarter sessions, first giving notice of appeal within fourteen days after cause of complaint.

At a special session for the highways, an order was made, reciting a complaint by the surveyor, that the owner had neglected to cut, prune or plash certain hedges and trees upon his farm, on the right hand side of a certain carriage way, situate, &c., whereby the sun and wind were excluded from the said carriage way, to the damage thereof, and whereby also obstructions were caused in the same carriage way, contrary to the statute, &c.; and that the owner had appeared and the said offence was proved; and the justices did thereby order the owner to cause the said hedges to be cut, &c., and the said trees pruned, &c., and the said obstructions complained of, to the injury or damage of the said highway, removed, within ten days from service of the order. The owner cut away some part of the hedge; but the surveyor considering the order not properly complied with, himself cut the hedge after the lapse of ten days, the owner not having in the mean time appealed. Trespass being brought, the judge at the trial, directed the jury that, although the plaintiff had not appealed, the surveyor was not justified unless the order was valid: *Held*, that the direction was right.

The judge, at the trial, also directed the jury that the order was bad.

Held, that the statement that the trees were on plaintiff's farm, and on the side of the road, was equivalent to a statement that he was the owner of the land next adjoining the road, so that the order was not bad altogether for omitting to show that fact.

Held also, that, the exclusion of sun and wind being one of the injuries complained of, the order was bad in part, as not stating the extent to which the cutting, &c., should take place with reference to that injury: *Semble*, that a direction to cut, &c., so as to prevent the sun and wind from being excluded, would have been sufficient, without any more precise orders as to the extent of the cutting.

Held also, that the order was bad as to trees, for not showing that they were not planted for ornament, &c.

But *held* also, that it sufficiently appeared by the order that there was a complaint of actual obstruction to the highway by hedges and trees which required cutting, &c., and a direction to remove that obstruction: wherefore, as the surveyors had lawful authority for part of the trespasses for which the damages were given, a venire de novo must be awarded.

TRESPASS for breaking and entering plaintiff's close, and cutting down and destroying his hedges, and cutting down, prostrating, and destroying the trees, bushes, shrubs, and thorns of plaintiff.

*Plea: Not guilty, by statute, (5 & 6 W. 4, c. 50, (a) s. 109.)
 *324] Issue thereon.

(a) Sect. 65 enacts, "that if the surveyor shall think that any carriage way or cart way is prejudiced by the shade of any hedges, or by any trees, (except those trees planted for ornament or for shelter to any hop ground, house, building, or court yard of the owner thereof,) growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway, to the damage thereof, or if any obstruction is caused in any carriage way or cart way by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land on which such hedges or trees are growing next adjoining to such carriage way or cart way to appear before the justices at a special sessions for the highways to show cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped, in such manner that the carriage way or cart way shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriage way or cart way to the damage thereof, or why the obstruction caused in such carriage way or cart way should not be removed; and the question as to the cutting, pruning, or plashing such hedges, or the pruning and lopping such trees, or the removal of such obstruction as aforesaid, shall, upon proof of the service of such summons, and whether the said owner attend or not, be determined at the discretion of such last-mentioned justices; and if such justices shall order and direct that such hedges shall be cut, pruned, or plashed, or such trees pruned or lopped, in manner aforesaid, or such obstruction removed, the said owner shall comply therewith within ten days after a copy of such order shall have been left," &c., "and in default thereof shall forfeit, on conviction, a sum not exceeding 40s.; and the said surveyor, if the order of the said justices is not complied with, shall and he is hereby authorized and required to cut, prune, or plash such hedges, and to prune and lop such trees, for the benefit and improvement of the highway, and to remove such obstruction as aforesaid, to the best of his skill and judgment, and according to the true intent and meaning of this act;" the surveyor to be reimbursed by the owner for the expenses, over and above the forfeiture; with a power of distress for the expenses and penalties.

Sect. 105 enacts that, if any person shall think himself aggrieved by order, &c., there shall be

This cause was first tried before PATTESON, J., at the Suffolk Summer assizes, 1840, and a verdict found for the defendants; which was afterwards set aside by the *Court of Queen's Bench; and a new trial was ordered. (a) The cause was tried a second time, at the Suffolk [325 Spring assizes, 1842, before ATCHERLEY, Serjt.: and the defendants below tendered a bill of exceptions to the learned judge's summing up. The jury found for the plaintiff below. Judgment being signed, a writ of error was brought in the Exchequer Chamber.

The bill of exceptions stated that on the trial the plaintiff below gave evidence that he, by indenture dated 15th September, 1836, demised to one Butcher, for eight years to commence from 11th October then next, a form comprising the locus in quo, except certain plantations, and "also all and all manner of timber, timber trees, and other trees, stands, pollards, bodies of trees, saplings, spires, shallows, willows, wood, underwood, topwood, *bushes, and thorns, *other than such bushes and thorns as shall be [326 necessary for the repairs of the fences,*" with liberty for him, (the lessor,) with servants, &c., from time to time, &c., during the demise, to enter upon the said premises, to lop, top, fell, &c., and carry away the same, or any of them, and to view and see the state and condition of the said premises, and to repair, &c. Covenants (amongst others) by the lessee, "that the said lessee shall not cut up, stub up, carry, lop, top, fell or injure, nor suffer to be so used, any of the timber trees, pollard trees or wood, now," &c., "or at any time during this demise, standing, growing or being upon the said demised premises, but shall and will use his and their utmost endeavours to preserve the young and other trees, and the fences, under the penalty," &c., (certain pecuniary penalties were then named for every timber tree, pollard, &c., used contrary to this covenant;) "and also shall and will yearly," &c., "during," &c., "cut, cleanse and scour one seventh part of the fences and ditches," &c., "laying earth," &c., "and planting such trees carefully therein as the said Abraham Brook, his heirs or assigns, may furnish, and direct to be so planted," &c.; "and during the continuance," &c., "keep, and on the expiration or sooner determination," &c., "leave all buildings," &c., "and fences in a good," &c., "repair, finding all materials except as hereinafter mentioned, the said Abraham Brook, his heirs or assigns, finding rough wood for making such repairs, if growing upon the premises." Covenant on the part of the lessor that he and his heirs should at all times during, &c., "find and provide the said Robert Butcher, if growing on the premises, sufficient rough timber, stakes and bushes for doing such repairs as are hereinbefore *cove- [327 nanted to be done by him the said Robert Butcher, his executors or administrators."

se, (the enactment including orders under sect. 65,) such person may appeal to the next general or quarter sessions, first giving to the surveyor or to the justice, &c., by whose act the party is aggrieved, notice of appeal, with a statement of the grounds, within fourteen days after the date of complaint shall have arisen, and entering into recognisance, &c.

(a) *Brook v. Butcher*, 2 Q. B. 268.

The plaintiff gave evidence that the farm demised was separated from the highway after mentioned by a fence formed by a bank and white thorn hedge growing on the top thereof and part of the demised farm, and that there were growing on the same bank, but springing from a lower part thereof, sixteen thorn trees of upwards of fifty years growth, which before committing, &c., had never been cut down or buckheaded, although the other thorns and bushes in the fence had been frequently cut down within a few feet of the ground; and that the defendants cut down the whole of the said hedge, and the bushes and thorns there, and particularly the said thorn trees, within a few inches of the bank: and that, before the defendants so cut the same, and after the making of the order hereinafter mentioned, the plaintiff caused the said fence and hedge to be cut, pruned and plashed, according to the judgment of a witness called by the plaintiff, so as to comply with the said order. And the defendants among other things gave evidence that what the plaintiff's witnesses called thorn trees were not thorn trees but thorns; and that, the defendants being surveyors of the highways for the said parish, a certain public carriage way in the said parish, adjoining the said farm, was prejudiced by the shade of the said hedge between the said farm and the said highway, and that the sun and wind were by the said hedge excluded from the said highway to the damage thereof, and that an obstruction was caused to the said highway by the said hedge: whereupon the defendants applied to one George Thomas, a justice of the peace in and for the said county, who thereupon on this application

•328] issued a summons to the plaintiff; the material parts of which sufficiently appear from the recitals thereof in the order hereinafter set forth.

The hedge in question is one of the hedges mentioned in the said summons. The plaintiff below appeared; and the case was heard at a special session for the highways, on 27th November, 1839; when the following order was made.

"Suffolk to wit. Whereas, on," &c., "information and complaint was made on oath unto me, George Thomas, Esq., one of her majesty's justices of the peace," &c., "and resworn on," &c., "before me George Thomas, and Robert Newton Shawe, Esq., one of her majesty's justices of the peace," &c., "by Edmund Jenney, of Hasketon," &c., "Esq., and one of the surveyors of the highways of the same parish, that Abraham Brook, of," &c., "being the owner of a certain farm, hereditaments and premises, situate in the said parish of Hasketon, in the occupation of," &c., "hath refused or neglected to cut, prune or plash the hedges, and to prune or top the trees, hereinafter mentioned, upon his said farm at Hasketon aforesaid, (that is to say,) the several trees on the right hand side of the carriage way or cart way, situate in the parish of Hasketon, leading," &c., (other trees were mentioned,) "and also the trees and hedges on the same side of the said carriage way or cart way growing or standing in a fence adjoining a certain field, called," &c., (other trees and hedges were then mentioned);

"whereby the sun and wind were excluded from the said carriage way or cart way, to the damage thereof, and whereby also obstructions were caused in the same carriage way or cart way, contrary to the statute in that case," &c.: "and *whereas, the said Abraham Brook having appeared before us the said justices at a special sessions for the highways [*329 held at," &c., "on," &c., "in pursuance of a summons duly served upon him to answer the said charge, and the said offence having been fully proved before us upon the oath of George Runnacles, also one of the surveyors of the said highways, we the said justices do hereby order the said Abraham Brook to cause the said hedges to be cut, pruned or plashed, and the said trees to be pruned or lopped, and the said obstruction complained of, to the injury or damage of the said highway, removed, within ten days from the service hereof; and we do also hereby order" costs to be paid by Brook to Jenney. "Given," &c. (27th November, 1839.)

The plaintiff below was served with a copy of the order on the day following the date thereof. And the defendants below also gave evidence that the plaintiff afterwards, although more than ten days had elapsed from the day of the service of the said order, had not caused the said hedge to be cut, pruned or plashed so that the sun and wind should not be excluded from the said way to the damage thereof, or the said obstruction removed. Whereupon the defendants, being surveyors as aforesaid, on, &c., proceeded to cut, prune and plash the said hedge for the benefit and improvement of the said highway, and to remove such obstruction as aforesaid to the best of their skill and judgment, and in so doing cut down the said thorn trees or thorns; for which cutting, pruning or plashing this action was brought. And thereupon the counsel for the defendants insisted that the plaintiff could not maintain the action by reason of the lease to Robert Butcher, and that the *trees, bushes and thorns in the declaration mentioned were not the trees, bushes and thorns of the plaintiff, and were not ex- [*330 cepted from the said demise: but the counsel for the plaintiff insisted that the said thorn trees, or thorns, and the bushes and thorns forming the said fence, were excepted out of the said demise, and were the thorns, thorn trees and bushes of the plaintiff, and that the plaintiff could maintain his said action notwithstanding his said lease. And the said justice then and there held, and affirmed, that the plaintiff could maintain the action notwithstanding the said demise, and that the said trees, bushes and thorns were excepted from the said demise, and were the trees, bushes and thorns of the plaintiff. And the counsel for the defendants further insisted that the order hereinbefore mentioned was a good order in point of law: but the said justice then held, and affirmed, and directed the jury, that the said order was bad on the face of it. And the counsel for the defendants further insisted that, the said order, even if bad in law, yet being a subsisting order, the defendants were justified in committing the trespasses aforesaid: but the said justice held and affirmed, and directed the jury, that, if the said order were bad in law, the defendants could not justify the said trespass under it;

and the said justice further directed the jury that, if the said trees, bushes and thorns were in fact cut, pruned and plashed by the defendants, the jury should find a verdict for the plaintiff. Whereupon the counsel for the defendants, conceiving that the jury, being directed as aforesaid, were misdirected as to the legal effect of the said lease and the said order, made their exceptions, &c.

*331] *The case was argued in Easter vacation, May 9th, 1844, before TINDAL, C. J., POLLOCK, C. B., PARKE, ALDERSON, (a) and ROLFE, Bs., and CRESSWELL, J.

Martin, for the plaintiffs in error, (the defendants below.) First, as to the exception in the lease. There is an exception out of the exception, so that the thorns and bushes necessary for repairing fences passed to the lessee under the demise, which is an ordinary demise, and but for the exception would pass thorns and bushes to the lessee; and the effect of the provision as to repairs is that, so far as any of the excepted matters shall be necessary for repairs, the lease shall operate in the ordinary way; therefore, the law of bote, Co. Lit. 41 b, does not apply to the present case, which rests entirely on the contract between the parties: and, the fences, and the thorns and bushes which formed the fences or should be necessary for the repairs, passing to the lessee, (who by the terms of the lease is bound to repair, so that *some* thorns, &c., must have passed to him,) it ought to have been left to the jury to find whether the thorns, &c., that were cut formed part of the fences, or were necessary to the repairs.

Secondly, as to the validity of the order. The general highway act, 5 & 6 W. 4, c. 50, s. 65, is framed so as to meet two different modes in which a highway may be prejudiced by trees on the road side; one by the exclusion of the sun and wind, the other by actual obstruction. The order, after stating a complaint that the trees and hedges in question both excluded the sun and wind, and obstructed the carriage way, finds that *the
*332] "said offence" was fully proved. It is established by *Rex v. The Undertakers of the Aire and Calder Navigation*, 2 T. R. 660, and numerous authorities collected in Burn's Justice by D'Oyley and Williams, vol. i. p. 693, note (a), that this court will intend an order of justices to be right if the contrary does not appear. It is no forced interpretation here to say that the word "obstruction" is a general term including obstruction of the sun and wind as well as of the road: and the word "offence" manifestly includes both the damage and the actual obstruction. At all events the order is good as to the latter. This point did not arise in the Queen's Bench, where the plaintiff below was entitled to have a new trial if the order was bad as to any part; here the judgment must be reversed if the order is good as to any part; for the part which is good might justify some of the trespasses, and so reduce the damages, even if it did not justify the whole.

(a) In the course of the argument, Alderson, B., left the court to go to the Central Criminal Court; but the argument proceeded by consent.

Thirdly, assuming the order to be defective, are the defendants trespassers? Their duty to protect the highways from damage and obstruction exists independently of the order. [CRESSWELL, J. But does their duty to do such things as are directed by this order arise before the owner neglects to obey it?] In some respects not; but, though the thing to be done is the same thing, whether it be done by the owner or the surveyors, as the thing which is ordered, the surveyors do it by virtue of their general duty and not under the order, to which they are not privy, and the contents of which the statute does not give them any means of learning. The plaintiff, on the contrary, was served with the order, and might have appealed against it under sect. 105: it would be unreasonable to hold that, after neglecting to do so, he can treat the surveyors as trespassers for doing the thing ordered: as between these parties it must be held, as was done in *Hall v. Biggs*, 2 Salk. 674, that the order, being a judicial act, is not absolutely void, but voidable, and continues an order till avoided. This point was not discussed in the Queen's Bench. And, even as to the question which was decided there, the nature of things shows that the order must be general in its terms: it could not possibly enumerate the twigs to be cut: the obvious meaning is that the cutting, pruning and plashing shall be to such an extent as shall remove the obstructions. The damage and obstruction to the highway may have amounted to a nuisance at common law, which the defendant might have abated independently of the statute.

Kelly, contra. First, as to the exception in the lease. The point now made was not raised at the trial, and is not the point intended to be raised in the bill of exceptions. At the trial it was urged as a ground of nonsuit; and the judge was not asked to put any question to the jury as to the thorns or bushes being necessary for repairs. [CRESSWELL, J. When a point is urged as affording an answer to the action, the judge may hold either that it does or that it does not, or that it depends upon the finding of the jury. Is not it enough in a bill of exceptions to say that the direction is wrong, without going on to state what would have been correct in law? PARKE, B. The point seems very clearly expressed. The learned judge construed the exceptions to comprise all, subject to a liberty in the tenant to take bote. The question is whether that was right. POLLOCK, C. B. The exception in the lease may be so construed as to comprise all the bushes that bodily formed part of the fence; but that would be unreasonable, for the lessor might then cut down the fences all over the farm.] The distinction between the thorn bushes and the thorn trees was not adverted to at the trial, where the attention of all parties was turned exclusively to the sixteen trees. [TINDAL, C. J. The covenant to provide, if growing on the premises, bushes for repairs shows that the bushes remained in the lessor: the common form is to except firebote, which is a mere liberty. CRESSWELL, J. There might be fifty acres of bushes, and one acre only necessary for repairs: which acre is excepted?] That question shows the

substantial intention to be to except bushes of all descriptions, though bodily forming part of the fence. Were it otherwise, to whom would they belong when nothing was wanted for repairs? It is clear that some are excepted from the demise; *prima facie*, all are excepted; and no evidence was given of any being necessary for repairs.

Secondly, as to the validity of the order. It is "a general principle of law, wherever a power is given to particular persons to do any written act in any particular manner, or under certain particular circumstances, whether it be to parish officers or magistrates, to grant certificates under which, if duly executed, other persons, especially public officers, are bound to act, or to grant warrants, or make orders, that their authority must appear *upon the instrument itself*. It must thereby appear that they are the persons authorized, and that *the certificate; warrant, or order, was
*335] made in the manner and under the circumstances required. Otherwise" it "is not obligatory, but void;" *Rex v. Austrey*, 6 M. & S. 319, 324: and any multiplication of the links of the chain makes no difference: if the original order on which proceedings are founded is defective in this respect, those subsequent proceedings are void, though themselves perfect in point of form; *Regina v. Martin*, 2 Q. B. 1037, note (a). It is said indeed that the surveyors did not act on the order now under consideration, that it is not addressed to them, and that they were no parties to it: but sect. 65 shows that they originate the proceeding, and that the summons issues on their application; and, whether it be addressed to them or not, the only case in which they are authorized themselves to cut, prune or plash the hedges is, "if the order of the said justices is not complied with:" that must mean a binding order, satisfying in itself the several matters mentioned in the earlier part of the section, not any order, perhaps by a wrong magistrate, or on a wrong person, that the surveyors may think proper to obey. The order is bad, at all events, in part. The enactment authorizes the justices to make an order that the hedges shall be cut, pruned or plashed "in manner aforesaid," i. e., "in such manner that the carriage way or cart way shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriage way or cart way to the damage thereof." But this order is "to cause the said hedges to be cut, pruned or plashed, and the said trees to be pruned or lopped," which is not authorized
*336] by the act; and the words which follow, "and the said *obstruction complained of, to the injury or damage of the said highway, removed," are unintelligible; the order does not charge an obstruction to the highway by a hedge or tree: it seems rather to refer to some obstruction of the sun and wind to the damage of the highway: nor do the words in the recital, "whereby also obstructions were caused in the same carriage way," amount to a charge of an obstruction of the highway; that would not be sufficient in an indictment for an obstruction. Stat. 5 & 6 W. 4, c. 50, s. 65, creates two offences, injury by shading, and actual obstruction. [CRESSWELL, J. Both may happen from the same omission.] They

re to be remedied in different manners. [PARKE, B. Both might be remedied by lopping.] The statute contemplates different proceedings in the two cases: where the offence is exclusion of the sun and wind, the summons is to show cause why "the said hedges *are* not cut," &c. ; where the offence is actual obstruction, the summons is to show cause why the obstruction "should not be removed:" it would, therefore, be improper to mix the two proceedings together, even if there were a distinct allegation of obstruction by a hedge or tree, which there is not. If this order is to be construed as a conviction for not pruning and plashing, the mandatory part is defective for not adding "in such manner that the carriage way," &c., "shall not be prejudiced," &c. ; if the order operates as a conviction for actual obstruction, the answer is that omitting to cut and prune, &c., whereby an obstruction is caused in the highway, is not an offence within the act. [POLLOCK, C. B. Might not the omission to lop cause such an obstruction?] That might be so as matter of evidence; but then the charge ought to be, "in the words of the act, of an obstruction caused by a hedge or tree. Instead of that the two charges are mixed [*337 together: the order is bad as to the first for the reasons already mentioned; and the second alleges only some obstruction consequential on the offence first charged.

There is another objection which goes to the whole order: the party is not shown to be the owner of land on which such trees and hedges are growing "next adjoining to such carriage way," within sect. 65: they are alleged only to be growing "on the right hand side of the carriage way:" but a house may be on the right bank of the Thames, and yet not adjoin to the river. Here, if a narrow slip intervenes, the case is one to which the statute does not apply; there is nothing from which any intendment can be drawn.

Martin, in reply. The effect of the lease may be to put detached thorns and bushes on the same footing as trees, which the lessor is expressly empowered to enter and cut at all times during the demise; but, as regards the fences, the tenant distinctly covenants to cut one seventh part of them every year. Besides this, he covenants to keep the fences in repair during the term, and to leave them in repair at the end of the term; how could he do that, if the fences did not pass to him so that he might cut them when necessary? It does sufficiently appear, on a fair construction of the order, that the land is next adjoining to the highway.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. After stating the pleadings and the evidence *as set forth in the bill of exception [*338 his lordship proceeded as follows.

The counsel for the defendants on the trial insisted, first, that the plaintiff could not maintain the action, because the thorns and bushes cut by the defendants were not excepted from the demise, and consequently belonged to the tenant. My brother ATCHERLEY held that they were excepted, and

directed the jury that, if the trees, thorns, and bushes were cut, pruned, and plashed by the defendants, a verdict should be found for the plaintiff. The counsel for the defendants excepted to this direction: and the first question for us to decide is, whether the exception is well founded.

It was argued before us that the direction was wrong, and that a question of fact should previously have been submitted to the jury, viz., whether the bushes and thorns so cut were a part of the hedge or fence or not, or were necessary for repair of fences; for that, if they were either, they were not excepted from the demise. It was answered, and, we think, rightly, that such a question was immaterial, for that trees and bushes were excepted whether part of the fences or not, or whether they might be necessary for repair or not. The exception is of all manner of trees, pollards, saplings, spires, wood, &c., bushes and thorns other than such bushes and thorns as should be necessary for the repair of fences; and these last words, we think, are to be construed not to except out of the exception any certain definite bushes and thorns. What are to be excepted depends upon the contingency of their being found necessary at some future time for repairs; and it seems to us that the true meaning of this clause is to preserve to the

*339] tenant the right of taking all or parts of such *thorns and bushes for repairs, when required, for which probably the assignment of the landlord would be necessary, according to his covenant. We, therefore, think, though the lord chief baron feels some degree of doubt upon this point, that all trees and all bushes, whether forming part of the fences or not, or necessary for repairs or not, are excepted from the demise; and, as timber trees, though in hedgerows, and though the body of the tree might form a part of the fence, would not pass to the tenant, but might be cut down by the landlord, leaving the tenant under the obligation to repair the gap thereby made in the fences, so, in like manner, bushes and thorns might be cut down and removed. The first exception therefore to my brother ATCHERLEY's direction cannot prevail.

The second objection taken on the trial was to the validity of the order of the justices. My brother ATCHERLEY ruled that the order was altogether bad, on the face of it. The defendants then insisted that, if it were so, still the defendants were justified in acting as they did, there being a subsisting order unappealed from, and disobeyed. The learned judge held that the defendants were not justified unless the order was valid.

In the propriety of this latter ruling we all concur, being of opinion that the surveyors cannot act unless there has been a previous default of the party in obeying a *valid* order. It is no answer to say that the party might have appealed from it, and that, if he did not, third persons might act as if he had acquiesced: so to hold, would be to deprive the party of part of the time for appeal allowed by the statute, viz. fourteen days; *the
*340] surveyors being authorized to act at the expiration of ten.

The only remaining question is, whether the direction of the learned judge that the order was invalid altogether can be supported? We think

it cannot ; and that it is bad in part only. When this case was before the Court of Queen's Bench, after the first trial, 2 Q. B. 265, that court directed a new trial, my brother PATTESON having been of opinion, on the trial, that the order was good and a protection to the surveyors as to all they did, but the court, and my brother PATTESON also, on further consideration, thinking that the order was bad ; and the principal, if not the sole, ground assigned was that the direction in the order to cut and plash was general, without any description of the extent to which it was to take place, so that any cutting, pruning, or plashing would have been a compliance with the order. This was all that was necessary to be decided on a motion for a new trial. But we are now called upon to decide whether the order was altogether invalid ; for, if it was invalid in part only, and the remainder was a justification for any of the acts done, the direction of my brother ATCHERLEY was wrong.

On the argument before us it was contended that the construction of the order by the Court of Queen's Bench was wrong, and that it was plain that the justices intended that the cutting, pruning, and plashing should be made to such an extent as to remove the obstruction of the access of sun and air to the road, as well as the obstruction in the highway itself, by the hedges and trees adjoining. We cannot, however, concur in this *mode of reading the order. We agree that a reasonable construction must [*341 be put upon the whole instrument, without making any intendment for or against it ; but it appears to us by the context, which contains a recital of the summons, that the exclusion of the sun and wind by the trees and hedges, and the obstruction of the road, are treated as different things, (as indeed the enactment of stat. 5 & 6 W. 4, c. 50, s. 65, clearly means that they should be,) and, consequently, there is no direction in the order as to the extent to which the cutting and pruning is to take place, with reference to the injury to the high road by the exclusion of the sun and wind. If the order had followed the summons in this respect, and had directed the plaintiff to cut, prune, and plash the hedges, and prune and lop the trees, so as to prevent the sun and wind from being excluded, it might have been sufficient without any precise orders as to the number of feet or inches that were to be cut. We therefore agree with the Court of Queen's Bench in the view which they took of this part of the order.

But it is said that the remainder of the order is good, and is sufficient to justify the defendants in removing any actual obstruction to the highway by the hedges or trees, or at least such as were caused by the projecting branches of the trees or hedges, and which might be removed by cutting, plashing, lopping, or pruning, though it would not justify such further cutting as was necessary to prevent the hedges or trees from damaging the road by excluding the access of sun and wind. And we are of opinion that the order in this respect is good, and that, reading the summons and order together, it sufficiently appears that there is a complaint by the *surveyor of obstruction to the road by hedges and trees which required [*342

cutting, plashing, pruning, and lopping, and a direction to remove that obstruction.

So far however as it relates to the trees the order is defective, as there is no statement that they were not planted for ornament, or shelter of a house ground, &c., which trees are excepted in the sixty-fifth section. It is good however, in respect of the hedges.

It was however objected to the order, that it was altogether bad, for the want of a statement that the plaintiff was the owner of the land next adjoining to the road. But we think that the statement that the trees were growing on the plaintiff's fence, and *on the side* of the road, is equivalent. They could not be growing on the road *side*, unless they were close to it, according to the strictest construction of the language.

We are therefore of opinion that the order, though informal, is good in part, and gave authority to the defendants to cut, prune, and plash the hedges so as to remove the actual obstruction to the carriage way, occasioned by the branches of the thorns, bushes, and shrubs forming part thereof, but no further. Therefore there must be a *venire de novo*; and, on the new trial, the jury will have to inquire whether the defendants did more than this, and to assess the damages incurred by the plaintiff if they did.

Venire de novo awarded.

*343] *The QUEEN v. The Inhabitants of MERIONETHSHIRE.

June 26.

Stat. 13 G. 3, c. 78, s. 64, empowered the court trying an indictment for non-repair of a highway to award costs if the defence was frivolous. Stat. 43 G. 3, c. 59, s. 1, enacts that all "matters, and things, in the said act contained, relating to highways," shall, so far as applicable, be extended and applied to county bridges "as fully and effectually as if the same and every part thereof were herein repeated and re-enacted."

Held, that the clause as to costs in stat. 13 G. 3, c. 78, was substantively re-enacted in stat. 43 G. 3, c. 59, with reference to county bridges, and therefore was not repealed when stat. 5 & 6 W. 4, c. 50, repealed, in general terms, stat. 13 G. 3, c. 78.

The judge who tries an indictment for non-repair of a bridge, removed by certiorari, may certify after the assizes that the defence was frivolous, and by such certificate award payment of costs to the prosecutor, which will be enforced by the court in banc.

An indictment against the defendants for non-repair of a county bridge was removed into this court by certiorari, and tried, before GURNEY, B., at the last Summer assizes for Merionethshire; when a verdict of Guilty was returned.

In last Michaelmas vacation the learned baron, after hearing the parties on summons, made the following certificate and order. "I certify that the defence to this indictment was frivolous, and order that the defendants pay costs to the prosecutors. J. GURNEY." The prosecutors then obtained a side-bar rule for taxation of their costs, judgment having previously been signed on the postea. In last Hilary term, a rule nisi was obtained for setting aside the certificate and rule for taxation.(a)

(a) See, as to the practice, *Reg. v. Pembroke*, 3 Q. B. 901, note (a).

Welsby now showed cause. Although stat. 5 & 6 W. 4, c. 50, s. 98, empowers the court before which any indictment is preferred "for not repairing highways" to give the prosecutor costs if the defence appear to have been frivolous, it appears, on reference to the interpretation clause, sect. 5, that the word "highways" does not include county bridges. The costs, therefore, could not be given under that act. *But stat. 13 G. 3, c. 78, s. 64, enacts "that it shall and may be lawful for the court before whom any indictment or presentment shall be tried for not repairing highways, to award costs to the prosecutor, to be paid by the person or persons so indicted or presented, if it shall appear to the said court that the defence made to such indictment or presentment was frivolous." And by stat. 43 G. 3, c. 59, s. 1, it is enacted that the surveyor of bridges in every county in England may take materials for the repair of county bridges and the roads at the ends thereof, and may remove obstructions from such roads and bridges, in such and the same manner as surveyors of highways are authorized so to do by stat. 13 G. 3, c. 78: and that "the several powers and authorities thereby vested in the surveyor or surveyors of highways, as well for the getting of materials as the preventing and removing of all nuisances and annoyances from such bridges and roads, shall be and the same are hereby vested in the surveyor and surveyors of county bridges, and the roads at the ends thereof as aforesaid; and the several penalties, forfeitures, matters, and things, in the said act contained, relating to highways, shall be and the same are hereby extended and applied, as far as the same are applicable, to such bridges, and the roads at the ends thereof as aforesaid, as fully and effectually as if the same and every part thereof were herein repeated and re-enacted." Stat. 5 & 6 W. 4, c. 50, s. 1, repeals stat. 13 G. 3, c. 78, but not stat. 43 G. 3, c. 59; and therefore the act of 13 G. 3, still remains in force, so far as it is incorporated in stat. 43 G. 3, c. 59; that is, so far as its provisions are applicable to those of the latter act. The judge who tried the case is the proper authority to *certify under stat. 5 & 6 W. 4, c. 50, s. 98; *Regina v. Pembridge*, 3 Q. B. 901; and there the judge was considered to have the same power as under stat. 13 G. 3, c. 78, s. 64. The application for a rule in this court to enforce payment of the costs was correct in practice; *Regina v. Preston*, 7 Dowl. P. C. 593.(a) (These two points were not disputed.)

Godson and *Hodges*, contrâ. Stat. 5 & 6 W. 4, c. 50, s. 1, enacts that stat. 13 G. 3, c. 78, and other renumarated acts, "shall be and the same are hereby repealed:" the consequence is that stat. 43 G. 3, c. 59, is repealed, so far as stat. 13 G. 3, c. 78, is incorporated with it. The effect of stat. 43 G. 3, c. 59, was to establish a new subject matter to which the prior act might apply; the provision as to certifying for costs, in stat. 13 G. 3, c. 78, s. 64, became referable to proceedings for non-repair of bridges: but there is no reason to presume that, when that clause was repealed as to the matters

(a) See the earlier case of *Regina v. Preston*, 2 Moo. & R. 137, and the comment upon both by Lord Denman, C. J., in *Regina v. Pembridge*, 3 Q. B. 905.

comprehended in the same statute, the legislature meant it still to operate on the subject matters of stat. 43 G. 3, c. 59. Nothing to this effect is contained in any provision as to costs in stat. 5 & 6 W. 4, c. 50. [COLERIDGE, J. According to your argument, there are no means now by which a prosecutor can recover costs if the defence is frivolous.] The only provision as to costs in 5 & 6 W. 4, c. 50, is in sect. 95. [*Welsby*. That applies only to the case of an indictment directed by justices, where the parties are heard on summons and the liability disputed.] Further, the object of stat. 43 G. 3, c. 59, appears, by *sect. 2, to have been the

*346] enabling of justices in quarter sessions to widen and improve bridges; and the enactment incorporating the provisions of stat. 13 G. 3, c. 78, must be understood as referring only to such improved bridges. [COLERIDGE, J. There is nothing in sect. 1 which so limits the reference.]

LORD DENMAN, C. J. There is certainly a difficulty in applying the clauses which have been cited. Stat. 5 & 6 W. 4, c. 50, repeals stat. 13 G. 3, c. 78; and, although it contains a clause (sect. 98) as to costs of frivolous defences, that, by the express provision of sect. 5, is not applicable to county bridges. But then stat. 43 G. 3, c. 59, s. 1, after giving increased power to the surveyors of county bridges, enacts that "the several penalties, forfeitures, matters, and things," contained in the former act, relating to highways, shall be "extended and applied, as far as the same are applicable," to county bridges "as fully and effectually as if the same and every part thereof were herein repeated and re-enacted." Therefore, supposing that the statute of 5 & 6 W. 4, does not apply to this matter in any way, the question still is whether stat. 43 G. 3, c. 59, which is unrepealed, does not keep alive the power given by stat. 13 G. 3, c. 78, s. 64. And I think it must be taken to do so. If the words of that clause had been expressly repeated in stat. 43 G. 3, c. 59, s. 1, the power would have been fully reserved: and the only question now is, whether, in effect, the words "penalties, forfeitures, matters, and things," do not include proceedings on an indictment for non-repair of a bridge. I know nothing which can be more to the purpose of this clause than an indictment for not repairing a

*bridge, and the defence to such indictment. I think, therefore,

*347] though I have not come to that decision without some difficulty, that the preponderance of argument is in favour of the conclusion that stat. 43 G. 3, c. 59, keeps alive the power as to costs created by stat. 13 G. 3, c. 78, s. 64.

PATTESON, J. The question is difficult; but it turns wholly on the words of stat. 43 G. 3, c. 59. By that act, sect. 1, the several "matters, and things," contained in stat. 13 G. 3, c. 78, relating to highways, are extended and applied to county bridges "as fully and effectually as if the same and every part thereof were herein repeated and re-enacted." Now, if sect. 64 of the former act had been in *terius* repeated and re-enacted in stat. 43 G. 3, c. 59, it is clear that such an enactment of the statute last mentioned would not have been repealed by stat. 5 & 6 W. 4, c. 50 s. 1. It is argued,

however, that sect. 1, of stat. 43 G. 3, c. 59, does not completely incorporate the provisions of stat. 13 G. 3, c. 78, but only makes it lawful to apply those provisions to the case of a county bridge so long as the act exists, and not longer. I think that is not so. The enactments give the same effect to stat. 43 G. 3, c. 59, as if this latter actually contained the clauses referred to of stat. 13 G. 3, c. 78.

WILLIAMS, J. It is impossible to say that this question is without doubt. One thing is clear: that stat. 5 & 6 W. 4, c. 50, s. 98, has no bearing upon it. It certainly appears strange that, when an act of parliament is per se abolished, it shall virtually have effect through another act. But any difficulty which that may raise is met by the manner in which the earlier act is introduced in stat. 43 G. 3, c. 59: "as if the same" [*348 "were herein repeated and re-enacted." To save the trouble of incorporating it in terms, they do so by relation: but the provisions are made part of stat. 43 G. 3, c. 59, as much as if they were expressly incorporated.

COLERIDGE, J. There is a difficulty of construction in this case: but it is conceded that, before stat. 5 & 6 W. 4, c. 50, a certificate according to stat. 13 G. 3, c. 78, s. 64, might have been granted. Then what effect has been produced by stat. 5 & 6 W. 4, c. 50, s. 1? It has repealed stat. 13 G. 3, c. 78; and the certificate, if it stands on that act merely, is useless. But the question is, whether stat. 43 G. 3, c. 59, merely gave the liberty of adopting the provisions of stat. 13 G. 3, c. 78, while in force, or whether part of the act last mentioned was, in effect, put into stat. 43 G. 3, c. 59. In the latter case the provision as to costs will remain untouched. And I think it does. The effect of stat. 43 G. 3, c. 59, s. 1, in my opinion, was, not only that the applicable clauses of the former act should extend to bridges, but also that they should stand as if contained in the act then passed.

Rule discharged.

*The QUEEN v. CLARKE and THOMAS, Justices of [349
SOMERSETSHIRE. June 26.

On application at petty sessions by guardians of a union, for an order of maintenance under stat. 2 & 3 Vict. c. 85, s. 1, the party charged attending, but not being ready to proceed, the case was postponed by consent, the defendant agreeing to admit that notice of application had been served. The admission was made; and the guardians proved by a witness that the notice was signed by the proper parties. At the adjourned petty session the defendant, being still unprepared, demanded (under sect. 3) that the case should be heard at the quarter sessions, and offered recognisances. The justices refused to take them, alleging that the case had already been entered upon at the last petty sessions. The hearing proceeded; and the defendant, by his attorney, cross-examined the witnesses, and addressed the justices in his defence. An order of maintenance was granted. On motion for a certiorari, *Held*, assuming the justices to have been wrong in refusing to take the recognisances, that the party charged had waived the objection by making his defence. Writ refused.

A RULE nisi was obtained in last Easter term for a certiorari, to remove into this court an order made in petty sessions by the above named justices. The material facts sworn to in support of the motion were as follows.

The guardians of the Wellington Union, Somersetshire, gave notice to Hugh Baker Bellett, that an application would be made to justices in petty sessions on November 2d, 1843, for an order upon him to reimburse the union for the maintenance of a bastard child, chargeable to the parish of Sampford Arundel, in the said union, and born, &c., and of which he was alleged to be the father. The guardians afterwards served notice of countermand, and gave a fresh notice of application for the petty sessions to be holden on December 7th, 1843. The attorney (Mr. Lyddon) whom Bellett had retained being unable to attend on that day, the guardians consented that the case should be postponed to the next petty sessions. Application was accordingly made to the justices in petty sessions, on December 7th, for such postponement, which they granted, no opposition being made on the part of the guardians. *At the ensuing petty sessions, (January *350] 4th, 1844,) Bellett was again unable to obtain the attendance of Mr. Lyddon; and, before the case was entered upon, he declared to the justices, by the attorney (Mr. BurrIDGE) who then attended for him, that he wished the charge to be heard at the quarter sessions, and was ready to enter into recognisance and give sureties to appear and answer at the quarter sessions, and to abide the judgment, &c., according to stat. 2 & 3 Vict. c. 85, s. 3.(a) Sureties had been provided and were ready. The justices, however, refused to take recognisances, giving, as a reason, that the case had been entered upon at the last meeting, and ought therefore to be proceeded with. The case was then heard; and the justices made an order of maintenance upon Bellett. In his affidavit in support of the rule, Bellett deposed that on the former occasion no proceeding took place, nor was the case or application entered upon, further than that the attorney then present on his behalf agreed with the attorney for the guardians to admit service of the notices, in order that the case might stand postponed by consent; the object of such admission being (as appeared by another affidavit) to prevent fresh notices being issued.

By the affidavits in opposition to the rule, the proceeding in petty sessions on December 7th, appeared to have been as follows. The guardians applied for an order of maintenance. Their attorney gave in evidence a duplicate of the notice of application served on Bellett; and Mr. BurrIDGE, who appeared for Bellett, admitted service of such notice: whereupon the attorney *351] for the guardians produced a witness who deposed that he saw *the persons whose names were subscribed to the duplicate notice sign that notice and another copy thereof at a meeting of the board of guardians, and that the persons signing were then guardians of the Wellington Union, and a majority of the board present at the meeting then held. After such evidence had been given, the attorney for Bellett requested an adjournment on grounds then stated by him; and it was granted. The clerk to the justices made the following entry of the proceedings in his book. "Petty Seesions. 7th December, 1843. Sarah Twose's case. Notice of intended

(a) See, now, stat. 7 & 8 Vict. c. 101, ss. 2, 3, 4.

application for order signed by a majority of the guardians, dated the 6th November, 1843, produced by Mr. Rodham. Service admitted. Signature to notice by guardians proved by Mr. Southey. Adjourned to the 4th January, 1844, on the application of defendant's attorney." At the petty sessions on January 4th, on the case being called on, recognisances were offered as already stated, and were refused, and the justices proceeded to hear the application: the attorney for the guardians produced witnesses; and Mr. Burridge, as the attorney for Bellett, and in his presence, cross-examined them, and, on the conclusion of the applicants' case, addressed the justices on its merits. The justices then found that Bellett was the father of the said child, and adjudged that he should pay, &c.

Godson and *Pashley* now showed cause. The objection is, in substance, that the magistrates had not jurisdiction to proceed; but the jurisdiction of petty sessions is not ousted by stat. 2 & 3 Vict. c. 85, s. 3, unless the party charged "shall" actually "enter into a recognisance" with sureties. [COLERIDGE, J. How can *he enter into recognisance, if the justices will not take it? PATTESON, J. They cannot keep up [*352 their jurisdiction by refusing to take recognisances.] The application should be for a mandamus to compel them.(a) But, further, if the justices were wrong in refusing to accept recognisances, Bellett should have withdrawn and allowed the guardians to proceed at their peril. The case is not like that of a party acquiescing in something absolutely void: the justices here had jurisdiction but for the right, if properly exercised, of removing the charge to the quarter sessions. Similar cases have arisen on writs of trial, where it has been held that a party knowing of an irregularity, and not insisting upon it in time, or suggesting it and then suffering the cause to proceed, could not afterwards avail himself of it to set aside the proceedings or demand a venire de novo; *Farwig v. Cockerton*, 3 M. & W. 169; *Cooze v. Neumegeu*, 9 M. & W. 290; *Brunskill v. Giles*, 9 Bing. 13. In *Regina v. The Justices of Cheshire*, 8 A. & E. 398, the justices in sessions, on hearing an appeal against a removal, decided (on objection made by the respondents) that the notice of grounds was bad; but the justices then discovered that the order of removal was defective, on which ground they quashed it, though the respondents' counsel contended that, as the appellants were out of court by the invalidity of their notice, the order ought to have been confirmed. This court refused a certiorari to bring up the order of sessions; and Lord DENMAN, C. J., observed: "The respondents themselves applied to have the order confirmed. Had they withdrawn, upon the notice being declared bad, they *might perhaps have more consistently contended that the magistrates were without jurisdiction." [*353 *Regina v. Committeemen for South Holland Drainage*, 8 A. & E. 429, and other cases show that, in determining whether or not a certiorari shall be granted, the court will look into the conduct of the party applying, even

(a) Other points were taken in showing cause, on which the court gave no direct decision and which became ultimately immaterial.

though his objection be well founded. Here the party took his chance of succeeding on the merits at the petty sessions. And, if this order be quashed, it will be too late, by stat. 2 & 3 Vict. c. 85, s. 1, to apply for another.

Carrow, contrâ. Nothing had taken place at the meeting on December 7th, but the proof of notices; a proceeding merely formal, and not to be considered as a hearing: *Regina v. Lord Hastings*, antè, p. 141, in effect decides this. If the justices had begun to hear the application itself before the recognisances were offered, it must be admitted, since the decision in *Regina v. Ozley*, antè, p. 256, that the case could no longer have been removed from the petty sessions; but here a different state of facts is shown. Bellett, when called upon by the justices, on January 4th, to answer, offered recognisances for his appearance at the quarter sessions: the petty sessions were then ousted of jurisdiction: and, if so, any acquiescence of Bellett, inferred from his subsequent conduct, could not make their further proceeding legal. *Lawrence v. Wilcock*, 11 A. & E. 941, and *Lismore v. Beadle*, 1 Dowl. N. S. 566, among other cases, show that, if jurisdiction is wanting, consent cannot give authority to proceed.

*Lord DENMAN, C. J. We cannot say here that the justices had
 *354] not jurisdiction. The party charged, attending with his legal adviser, requests an adjournment. The justices, perhaps improperly, refuse. Then the party, if he meant to insist on his objection to their proceeding farther, should have come away, and not remained to take his chance of the hearing. The rule must be discharged.

PATTESON, J. This was a clear waiver of the objection. The party took his chance.

COLERIDGE, J.(a) The objection was clearly waived. The justices had jurisdiction in the first instance. Bellett took it away by offering recognisances. But he might revive it by going on. The case is different from *Lawrence v. Wilcock*, 11 A. & E. 941, and *Lismore v. Beadle*, 1 Dowl. N. S. 566, where there was no jurisdiction originally.

Rule discharged.

(a) Williams, J., had left the court.

*WILLIAMS and Another, Assignees of JABEZ VINES, a Bankrupt, v. EDWARD VINES and Another. June 26. [*355]

Assumpsit against E. and H., attorneys, for money had and received. Plea, that plaintiff had retained and employed E. as his attorney, and was indebted to him for work, &c., and thereupon plaintiff and defendants agreed that, in lieu of the sole retainer of E., defendants should be jointly retained and employed by plaintiff as his attorneys, and that they should have a lien upon all moneys which they should receive for plaintiff in the course of such employment, to the amount of all debts that then were or thereafter should be due from plaintiff to E. solely or to defendants jointly in respect of the said retainers and work, &c., respectively; and that they should hold and apply the same on account and in discharge of such debts to E. or to defendants jointly, and thereout pay to E. and to defendants the said debts respectively. *Averment* that defendants, on such joint retainer, did work, &c., for plaintiff; and there became due, and was still due, from him to them in respect thereof a certain sum, which, together with the said debt to E., exceeded the amount claimed in this action. That defendants received the amount so claimed to the use of plaintiff in the course of their said retainer and employment, and as the attorneys of plaintiff, and under and by virtue of their said retainer and employment, and subject to the said lien, and held and applied part thereof (*viz.* &c.) on account and in discharge of the debt due to E., and paid him the same, and the residue (*viz.* &c.) on account and in discharge of the debt due to defendants, and paid themselves the same.

Held, a bad plea, as substituting a different contract for that declared upon, and consequently amounting to the general issue.

ASSUMPSIT, for money had and received to the use of the bankrupt, and on an account stated with him, before the bankruptcy; and for money had and received to the use of the plaintiffs as assignees, and on an account stated with them as assignees.

Plea 4: as to 142*l.* 10*s.* 3*d.*, parcel, &c., that heretofore, and before the bankruptcy of Jabez Vines, to wit on, &c., the defendant Edward Vines had been employed and retained by the said J. V. as the attorney and solicitor of and for the said J. V., and in and for the performance and management of certain work and business of the said J. V.; and the defendant E. Vines by means thereof had divers large claims and demands amounting, to wit, to 200*l.* upon and against J. V.; and the same was then due and owing from J. V. to the said E. Vines; and thereupon afterwards, to wit on &c., and before the bankruptcy of J. V., it was agreed by and between *J. V. and the defendants that, in lieu of the sole and separate [*356] retainer and employment of the said E. Vines, the defendants should be jointly concerned for and employed and retained by J. V. as the attorneys and solicitors of and for J. V. in and for the performance and management of the said work and business of J. V., and in and about other the work and business of J. V., and that defendants should have a lien upon all moneys they should receive to and for the use of J. V. in the course of their said retainer and employment, to the amount of all demands and debts that then were or thereafter should or might be due from the said J. V. to the said E. Vines solely, or to the said defendants jointly, in respect of the said retainers and employments of him and of them respectively, and in respect of the work and business of J. V. by defendant E. Vines separately, and by the defendants jointly, respectively done; that defendants

should hold and apply the same to and for and on account and in discharge of as well all debts and demands that then were or thereafter should or might be due from J. V. to the said E. Vines, solely, as to the defendants jointly, in respect of the said retainers and employments of him and them respectively, and in respect of the work and business of J. V. by defendant E. Vines separately, and by the defendants jointly, respectively done, and thereout pay defendant E. Vines, and them the defendants, respectively, the said debts and demands respectively. Averment that afterwards, and before the bankruptcy of J. V., to wit on, &c., and until and on, &c., in lieu of the sole and separate retainer and employment of the said E. Vines, defendants were retained and employed by J. V. as his attorneys and solicitors *357] pursuant to the said agreement, and did perform *the work and business of J. V.; and there became thereby and was, to wit on the day and year last aforesaid, and before the bankruptcy of J. V., due to defendants, in respect thereof, a certain other large sum of money, to wit 200*l.*, the same, together with the said debt and demand due to E. Vines, amounting in the whole to a certain large sum exceeding the said sum of 142*l.* 10*s.* 3*d.*, to wit to the sum of 400*l.*; and, save as hereinafter mentioned, the same continued and was due and owing thence until and at the time of the commencement of this suit. And defendants in fact say that they the defendants received the said 142*l.* 10*s.* 3*d.*, in the introductory part of this plea mentioned, to and for the use of J. V. in the course of their said retainer and employment, and as the attorneys of J. V., and under and by virtue of their said retainer and employment, and subject and liable to the said lien, and did then, to wit on the day and year in the said first count mentioned, and before the bankruptcy of J. V., hold and apply a large part thereof, to wit 117*l.* 9*s.* 1*d.*, for and on account and in discharge of the said debt so due to the said E. Vines as aforesaid, and then paid him the same, and the residue thereof, to wit 25*l.* 10*s.* 11*d.*, for and on account and in discharge of the said debt due to defendants as aforesaid, and then paid themselves the defendants the same. Verification.

Demurrer, assigning causes which will appear sufficiently by the argument. Joinder in demurrer.

Pashley for the plaintiff. The plea is bad, because, in effect, it denies the contract, and amounts to the general issue. If the plea is true, the defendants never *were liable to pay on request. *Solly v. Neish*, *358] 2 Cro. M. & R. 355, S. C. 5 Tyr. 625; *Hill v. Allen*, 2 M. & W. 283; (a) *Morgan v. Pebrer*, 3 New Ca. 457; *Brind v. Dale*, 2 M. & W. 775; *Whittaker v. Mason*, 2 New Ca. 359; *Payne v. Hales*, 5 M. & W. 598; and *Nash v. Breeze*, 11 M. & W. 352, show that a special plea, denying or qualifying the alleged contract as is done here, cannot be maintained. The defence is, in fact, lien; and that may be given in evidence, under a plea of not possessed. Further, the plea is bad because it answers the declaration as to the debt only, and not as to the damages.

(a) See *Bracey v. Carter*, 12 A. & E. 373.

Bramwell, contra. It is consistent with the plea that the defendants, under the contract pleaded, may have received a larger sum on the bankrupt's account than their lien amounted to. If so, it could not be said that part of the money was not received by them to the bankrupt's use; and, if any part was so, the whole was. Whatever might be the extent of lien, as compared with the amount received under the contract, that money was still received to the bankrupt's use; and when it came to the hands of the defendants a right of action accrued. If the debt for which the lien was established had been paid or released, the bankrupt might clearly have brought money had and received for the whole sum in the defendant's hands; yet no new contract would have arisen. That the defendants, under a contract, received the money on their own account, and not the bankrupt's, would be an answer to the action under the general issue; but to assert that the plea shows such a contract is a fallacy. A lien does *not so alter the right in which money is received. [PATTESON, J. The [*359 plea, as Mr. *Pashley* puts it, does not deny that the money was received to the bankrupt's use, but alleges that it was not so received as to constitute a debt for money had.] The receipt to his use would of itself constitute a debt. If the lien had been discharged, and an action brought for the money received, the statute of limitations would have run from the time of the receipt. And here the lien attaches partly in respect of work done after the receipt of the money: so far, the terms on which the money was received are clearly not affected by the lien. That is sufficient to distinguish the case from *Solly v. Neish*, 2 Cro. M. & R. 355, S. C. 5 Tyr. 625, where the whole defence raised by the plea was that the moneys were received in the first instance, not to the use of the plaintiffs, but to reimburse the defendant for advances made by him on the security of goods which produced the money in question. In *Stephen on Pleading*, 463, 464, (5th ed.), after citing *Dicken v. Neale*, 5 Dowl. P. C. 176, where the plea was held bad as amounting to "Never indebted," the author, referring to *Solly v. Neish*, 2 Cro. M. & R. 355, S. C. 5 Tyr. 625, says: "In assumpsit for money had and received by the defendant to the plaintiffs' use, the defendant pleaded that the money so received was the amount of certain goods consigned to him as a security for any advances he might make, with a power of sale to reimburse himself, and that he sold the goods accordingly. The plea was held bad on the same ground." There the defendant, in effect, asserted that the goods, when sold, were his: here the defendants admit that they received the moneys on the bankrupt's account. In *Morgan v. Pebrer*, 3 New Ca. 457, *the defendant alleged that his contract [*36C with the plaintiffs was not that stated in the declaration, but a different one. The objection here would be well founded if the plea in substance alleged an assignment by the bankrupt to the defendants of any sums due to the bankrupt which should come to their hands; but that differs totally from an agreement for a lien, which lien may not have accrued when the moneys were first received. [PATTESON, J. Suppose a party

gave a power of attorney to receive moneys, and out of them to pay the receiver himself, or a third person, a debt due to him.] The whole money might be had and received to the employer's use. In *Carr v. Hinckley*, 4 B. & C. 547, where, to assumpsit for goods sold, the defendant pleaded facts showing that he had an available set-off for money due to him from the plaintiff's factor who had sold the goods as his own to the defendant, this court held that the plea was not bad as amounting to the general issue, for it admitted a *prima facie* debt to the plaintiff, but avoided it by matter operating in extinguishment. [PATTESON, J. Your plea does not admit a breach of contract; it asserts that the money came to you in such a way that you were not bound to pay it over. COLERIDGE, J. You claim a right to apply the moneys received in discharge of your own debt.] If the owner does not pay off the lien: but in the first instance the moneys are received to his use. As to the second point, the damage, as was laid down in *Van Sandau v. Corsbie*, 3 B. & Ald. 13, 18, is only accessory to the principal debt; and whatever shows that discharged is an answer as to the damage. [Lord DENMAN, C. J. Ought not that specific answer to have been pleaded?] It is, in effect.

**Pashley* in reply. The case is put on behalf of the defendants *361] as if a contract arose after the money was received. But the facts pleaded show that the defendants really justify by the contract under which they received it. Therefore their plea qualifies or denies the contract.

Lord DENMAN, C. J. The plea cannot be sustained. This is shown by the very argument that no answer was necessary as to the damages. If the matter pleaded makes that unnecessary, it follows that the contract itself is qualified or denied.

PATTESON, J. I agree that *Solly v. Neish*, 2 Cro. M. & R. 355, S. C. 5 Tyr. 625, is distinguishable from this case, because there it was expressly alleged that the defendant sold the goods, by consent of the plaintiffs, to pay his own debt. Still the effect of the plea here is that the money was received under the special contract declared upon, and not to the use of the bankrupt: the objection, therefore, must prevail.

COLERIDGE, J., (a) concurred.

Judgment for plaintiffs.

(a) Williams, J., had left the court.

*BOUCHER v. MURRAY. June 27.

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Declaration on a guarantee stated that, in consideration that plaintiff would *make advances* of money by way of loan to B., defendant promised to repay *plaintiff* such sums as he should *so advance*, if B. should make default: breach, that B. made default, and defendant did not pay *plaintiff*. Plea, that plaintiff did not *make* the said advances to B., in manner and form, &c. Issue thereon.

The judge, at the trial ordered the declaration and plea to be amended under stat. 3 & 4 W. 4, c. 42, s. 23, by stating in the count that, in consideration that plaintiff would *procure the British and Australasian Bank, in which plaintiff was a partner, to make advances, &c.* to B., defendant promised plaintiff to repay *the said bank* such sums as plaintiff should *so cause to be advanced, &c.*: and, in the plea, that plaintiff did not *procure the said bank to make the said advances*.

Held, that such amendment was not warranted by the statute.

ASSUMPSIT. The declaration stated that, before and at the time of making the promise, &c., to wit on, &c., one Thomas Bland was possessed of divers, to wit ten, shares of and in a certain joint stock company, to wit a certain joint stock company called The Swansea and Gwann Cae Gurwen Anthracite Company, on which said shares divers sums of money amounting to, &c., to wit, the sum of 300*l.*, had then been paid up into and towards the capital stock and funds of the said company: And the said T. B. had then requested the plaintiff to *make him* certain advances and loans of money upon the security of the said shares, and plaintiff had then declined and refused to *make any advance or loan of money to the said T. B.* upon the security of the said shares, unless further security for the same should be given and provided by the said T. B. to and for the plaintiff: And thereupon heretofore, to wit on, &c., in consideration that the plaintiff would make advances of money by way of loan on the said shares to the said T. B., he the defendant then, to wit on, &c., undertook and faithfully promised the plaintiff to repay to *him* at the expiration of twelve calendar months from the time of making the said promise, &c., to wit, from the day and year last aforesaid, such sums of money, to the extent of 500*l.*, as he the said plaintiff should *so advance* to the said T. B., in case the said T. B. should *make default* in that behalf, and in case the said shares should not make up the amount of the said money so advanced as [*363 aforesaid. And the plaintiff says that he, confiding, &c., did afterwards, to wit on, &c., make divers advances of money, to wit to the amount of 400*l.*, by way of loan on the said shares to the said T. B., who then deposited the said shares with the said plaintiff as security for the said money, and then requested the said plaintiff to advance the same, and accepted the same as such advances as aforesaid. The declaration then alleged that, although twelve calendar months, &c., had elapsed, and T. B. had made default in payment, and the shares had become and were of no value, of which premises the defendant had notice and was requested to repay to the *plaintiff* the said amount, &c., yet defendant, not regarding, &c., had not repaid to the *plaintiff* the amount, &c., although the same did not extend to 500*l.*, &c.

Pleas. 1. Non assumpsit. 2. That the plaintiff did not make the said advances, &c., to the said T. B., in manner and form, &c. 3. That the said T. B. was not and had not been requested to repay the said advances, in manner and form, &c. Issues thereon.

There were other pleadings, which it is unnecessary to state.

On the trial, before PARKE, B., at the Essex Summer assizes, 1843, it appeared that the guarantee was given by the defendant in the following letter, addressed to the plaintiff, who was director and sole manager of the British and Australasian Bank.

“F. BOUCHER, Esq.,
B. & Austn. Bank.

Sir,—In consideration of your making advances by *way of loan
*364] on shares in the Anthracite Company, on which 300*l.* have been paid, to T. Bland of Bedford Row, I undertake and promise to repay to you such advances in his default, and in case the shares shall not make up the amount, to the extent of 500*l.*, on the expiration of twelve calendar months from this date. I am, Sir, &c. “T. LAMIE MURRAY.”

At the close of the plaintiff's case the learned judge said that, in his opinion, the meaning of the contract was that the bank should make the advance, and the advance might, upon the evidence, more properly be said to have been made by the bank than by the plaintiff; and therefore he thought that, on the present record, the plaintiff could not recover: he observed, however, that the defect appeared to him to be a misdescription or variance in the mode of stating the contract, which might be amended under stat. 3 & 4 W. 4, c. 42, s. 23; and the plaintiff's counsel thereupon elected to amend. The defendant's counsel refused to consent: and the learned judge made an order, without consent, to amend the declaration and pleas, giving leave to move to enter a nonsuit if the court should think such amendment unauthorized by the statute.

The declaration then stood as follows. After the recital, (as in p. 362, ante,) that Bland was possessed of certain shares, &c., the count proceeded,

And the said T. B. had then requested the plaintiff *to procure the British and Australasian Bank, in which the said plaintiff was a partner and manager, to make to the said T. B. certain advances and loans of money upon*
*365] *the security of the said shares, and the plaintiff *had then declined* and refused *so to do unless further security for the same should also be given and provided by the said T. B. to and for the plaintiff: And thereupon heretofore, to wit on, &c., in consideration that the plaintiff would procure the said British and Australasian Bank to make advances of money by way of loan on the said shares to the said T. B., he the defendant then, to wit on, &c., undertook and then faithfully promised the plaintiff to repay to the said bank, at the expiration of twelve calendar months from the time of making the said promise, &c., to wit from the day and year last aforesaid, such sums of money, to the extent of 500*l.*, as he the said plaintiff should so cause to be advanced to the said T. B., in case the said T. B. should make*

default in that behalf, and in case the said shares should not make up the amount of the said money so advanced as aforesaid. And the plaintiff says that he, confiding, &c., did afterwards, to wit on, &c., *procure the said British and Australasian Bank* to make divers advances of money, to wit to the amount of 400*l.*, by way of loan on the said shares to the said T. B., who then deposited the said shares with the said plaintiff as security for the said money, and then requested the said plaintiff to *procure the said advances to be made as aforesaid*, and accepted the same as such advances as aforesaid, &c. The breach was not altered except by alleging that defendant was requested to repay to the *said British and Australasian Bank* the said amount, &c., and had not repaid to the *said bank*, &c.

In plea 2, as amended, the defendant said that the plaintiff did not *procure the said bank* to make the said advances, &c.

Verdict for the plaintiff.

*In Michaelmas term, 1843, Sir *W. W. Follett*, solicitor-general, moved for a rule to show cause why a nonsuit should not be entered, [*366 or a new trial had, on the grounds that the amendment introduced a new contract, and therefore went beyond the power given by the statute; *Brashier v. Jackson*, 6 M. & W. 549: and that, assuming the amendment to have been properly made, the evidence did not support the amended count. A rule nisi was granted.

S. Hughes now showed cause. It is not shown by affidavit that the defendant was prejudiced by the amendment; that was suggested by Lord ABINGER, C. B., in answer to a motion like the present, in *Sainsbury v. Matthews*, 4 M. & W. 343. [Lord DENMAN, C. J. It was not said there that such an affidavit would have been received, but that even an affidavit was not offered. The doctrine of that case is, that the judge should take his own view of the subject.] The amendment did not alter the real situation of the parties. The plaintiff was a managing partner in the bank: the contract between him and the defendant for advances from the funds of the bank might be treated either as made with him individually, or as made with the bank. *Garrett v. Handley*, 3 B. & C. 462, was cited at the trial; but the decision in that case, that the action on a guarantee was improperly brought by one partner, the money having been advanced by the whole partnership, appears not to have been correct; the second action in which the partnership sued on the same guarantee was held to be rightly brought, the indemnity being for their benefit; **Garrett v. Handley*, 4 B. & C. 664; but BAYLEY, J., said, "May not the action be brought either [*367 in the name of the party with whom the contract was made, or of the party for whose benefit it was intended?" To advance and to cause to be advanced are substantially the same thing; *Aleberry v. Walby*, 1 Stra. 229, 231. The want of jurisdiction to make this amendment is inferred from *Brashier v. Jackson*, 6 M. & W. 549; but there the judge had given leave to make the amendment after the trial, which alone was sufficient ground for the

decision; all that was said on the merits of the amendment was extrajudicial. And it did, in fact, alter the rights of parties. Amendments more material than that now in question have often been held allowable; *Hanbury v. Ella*, 1 A. & E. 61; *Smith v. Brandram*, 2 Man. & G. 244; *Evans v. Fryer*, 10 A. & E. 609; *Guest v. Elwes*, 5 A. & E. 118; *Parry v. Fairhurst*, 2 Cro. M. & R. 190, S. C. 5 Tyr. 685. The declaration, as amended, was borne out by the evidence. The written guarantee is addressed to the plaintiff individually: but parol evidence might be given that he acted for others as well as for himself; *Wilson v. Hart*, 7 Taunt. 295; *Higgins v. Senior*, 8 M. & W. 834, 844; *Trueman v. Loder*, 11 A. & E. 589.

Bramwell, contra. The first argument advanced on the other side is that the amendment is good, because it was unnecessary. But it did, in fact, alter the situation of the parties. It introduced a new party, the *Australasian Bank*: they were to lend; and to them *Bland was to be under obligation. An amendment cannot be allowed where it raises an entirely different contract. And here the second plea as well as the declaration is totally changed, which (as COLERIDGE, J., observed on the motion in this case) takes from the defendant his discretion as to the matter he shall plead. In *David v. Preece*, 5 Q. B. 440, it was held that the judge at nisi prius could not, at the defendant's instance, amend pleas by substituting for the transaction pleaded an entirely different one. The necessity of altering the plea is a test showing the inadmissibility of a proposed amendment in the declaration. In *Perry v. Watts*, 3 Man. & G. 775, the declaration stated an appointment: the deed relied upon as so operating was found defective at the trial; but the plaintiff's counsel proposed to amend by describing it as a grant. The Court of Common Pleas, as appears by the judgments in *Gurford v. Bayley*, 3 Man. & G. 781, considered it an objection to such amendment that, if it were allowed, the defendant would have to plead different pleas. The observations of Lord ABINGER, C. B., and ALDERSON, B., in *Brashier v. Jackson*, 6 M. & W. 554, 555, 558, are an express declaration of opinion that an amendment, introducing a new contract and a new breach, and requiring the pleas to be remodelled, is inadmissible. The plaintiff here does not profess to sue in the capacity of an agent for the bank; and the guarantee corresponds with the form of the declaration: then it appeared by extrinsic evidence that the plaintiff contracted, not for himself alone, but for the bank; and hence it became necessary to amend. (He was then stopped by the court.)

*369] Lord DENMAN, C. J. The amendment cannot stand. The introduction of a new fact carries the case beyond any of those in which amendments have been allowed.

PATTESON, J. I am of the same opinion. The plaintiff sues in his individual character; and, on the first view, the obvious meaning of the parties seems to be that he is so contracted with. But then it is said that the words "in consideration of your making advances" mean "in considera-

tion of the bank making advances." If so, the promise is to the bank; and how that can be made the same thing as a promise to the plaintiff individually, I cannot see.

WIGHTMAN, J.(a) The amendment introduces a new term into the agreement, "*cause to be advanced by the Australasian Bank:*" and, as the declaration stands when amended, it is not supported by the evidence.

Rule absolute for a new trial.

(a) Williams, J., had left the court.

*ALDRED and Another, Assignees of JOHN BROWN, a Bankrupt, v. Sir THOMAS ASTON CLIFFORD CONSTABLE, Baronet, and CHARLES BROWN. June 27. [*370]

Trover against sheriff for goods particularly described in the declaration. Plea, that defendant seized and sold the goods under a fi. fa., at the suit of J. Replication, that the conversion complained of in the declaration is not the seizing and taking of the goods in the plea mentioned under the said writ, and that plaintiffs sue, not in respect of such seizing and taking, nor of goods seized, taken and sold under the said writ, but for that plaintiffs were lawfully possessed of the goods in the declaration mentioned, which were other than and different from the goods seized, &c. by defendants under J.'s writ, and that defendants converted and disposed of the said goods in the declaration mentioned, &c. Plea, Not guilty.

It was proved that the sheriff received J.'s writ, and seized under it goods of the debtor, including those claimed in the action of trover: he then received a writ at the suit of C., which afterwards proved invalid. After receiving the second writ he sold the goods on two successive days. The first day's sale produced enough to satisfy J.'s writ: the action of trover was brought by the assignees of the debtor (who had become bankrupt) for the goods sold after J.'s execution was satisfied.

Held, that the sale was not to be considered entire and indivisible; but that the sheriff, after selling enough to satisfy the first writ, was liable in trover for the goods sold beyond that amount.

And that plaintiffs were right in new assigning, and ought not to have pleaded a mere traverse of the allegation that the goods were sold under J.'s writ.

A sheriff, after selling enough to satisfy an execution, is not justified in selling more on the supposition that, by accident for which he is not answerable, the amount levied may become insufficient.

TROVER for two hundred stone bottles, and other goods and chattels specifically described, and laid to have been in the possession of the plaintiffs as assignees of John Brown, a bankrupt.

Pleas, by defendant Constable. 1. Not guilty. 2. Plaintiffs not assignees in manner and form, &c.(a) 3. Not possessed. Issues thereon.

4. That John Brown was a trader, &c.: the plea then alleged a petitioning creditor's debt; and that John Brown became bankrupt; and that afterwards, and before the committing of the grievances, &c., one James Brown sued out of the Queen's Bench a fi. fa. against John Brown, directed to the sheriff of Yorkshire, which writ, endorsed to levy, &c., was delivered to defendant Constable, *then being sheriff of Yorkshire, to be executed; and he, being such sheriff, after the bankruptcy and before [*371] fiat, to wit on, &c., seized the goods in the declaration mentioned for the

(a) This plea was withdrawn. See note (a) to *Aldred v Constable*, 4 Q. B. 674.

purpose of levying the said moneys as by the writ he was commanded, and did afterwards, to wit on, &c., and before fiat, by sale thereof levy the said sums of money as by the writ he was commanded; and that the said goods were, immediately before and at the time of the bankruptcy, the property of John Brown, and liable to be taken and seized under the writ; that afterwards, to wit May 6th, 1840, a fiat issued against John Brown, under which he was adjudged a bankrupt, and (after the requisite proceedings) the plaintiffs were chosen and became assignees, and, as such, entitled to the possession of the goods as from the time when John Brown became bankrupt; which possession is the possession of the plaintiffs as assignees in the declaration mentioned. Averment, that the *fi. fa.* was *bonâ fide* executed and levied, and the goods and chattels seized, by the defendant Constable, as sheriff, before the date and issuing of the fiat; that James Brown and defendant Constable had not, at the time of executing or levying, notice of any prior act of bankruptcy committed by John Brown; that the judgment on which the writ issued was not founded on any warrant of attorney or cognovit given by John Brown by way of fraudulent preference; and that the seizing under the said writ is the conversion in the declaration mentioned. Verification.

Replication. "That the conversion in the said declaration mentioned and complained of was not and is not the seizing and taking the goods and effects in the said fourth plea mentioned under and by virtue of the said writ at the suit of the said James Brown; and that *plaintiffs issued
*372] their writ, and declared, and brought their action, against the said defendants, not for or in respect of such seizing and taking, nor for or in respect of goods and effects which were seized and taken and sold under and by virtue of the said writ, but for that the plaintiffs, as such assignees as aforesaid, to wit on the said day in the said declaration mentioned in that behalf, were lawfully possessed of the said goods and chattels in the said declaration mentioned, and which said goods and chattels were other and different than the said goods and effects which were seized and taken and sold by the said defendant Constable under and by virtue of the said writ at the suit of the said James Brown; and for that the defendants afterwards, to wit on the same day in the said declaration in that behalf mentioned, converted and disposed of the said goods and chattels in the said declaration mentioned to their own use." Verification.

Plea to the new assignment: Not guilty.

5. Plea like the 4th, only stating a *fi. fa.* at the suit of Charles Brown. Replication, admitting the bankruptcy, seizure, and sale under the *fi. fa.*, property in John Brown before the bankruptcy, fiat, appointment of plaintiffs, and their title and possession, as assignees; *De injuriâ* as to the residue. Issue thereon.

Charles Brown pleaded separately. The parts of the record affecting him exclusively are immaterial to this report.

This cause was tried a second time, (see *Aldred v. Constable*, 4 Q. B.

674,) before WIGHTMAN, J., at the York Summer assizes, 1843. It appeared, as before, that the warrant of attorney on which Charles Brown obtained judgment and execution was given under circumstances which, as was said, showed a fraudulent *preference. After seizure, and before sale, the plaintiffs, referring to Charles Brown's execution [*373 only, gave the sheriff notice that John Brown had committed an act of bankruptcy on which a fiat was about to be issued. The other parts of the evidence material to the present report, and the points taken for the defendants, were stated as follows in the judgment of this court delivered as after mentioned.

"Upon the evidence it appeared that on the 23d of April, the sheriff received the writ at the suit of James Brown, under which he justified; and that on the 24th of April he received a fi. fa., at the suit of Charles Brown, for 313*l.* 11*s.* The sheriff had seized all the goods of the bankrupt under the writ at the suit of James Brown, before he received the writ at the suit of Charles Brown: but he remained in possession under both writs until the time of the sale, which took place on the 28th and 29th of April. The first day's sale of the goods produced more than sufficient to cover and satisfy the writ at the suit of James Brown. There remained, however, at the end of the first day's sale, as many goods that had been seized by the sheriff under the two writs as produced at the sale on the following day 149*l.*; and the plaintiffs contended that they were entitled to a verdict upon the new assignment in respect of those goods."

The defendants answered that, if the plaintiffs meant to claim part of the goods as not having been taken and sold under James Brown's writ, they should have traversed the allegation in the plea that they were so taken and sold, instead of new assigning, whereby they in effect admitted that all the goods were covered by the plea. And they urged that, in fact, the sale was one *continuous proceeding, and was, throughout, a sale under James Brown's execution. Also, as to the sheriff, that he was not [*374 liable, being bound to enforce the writ without reference to the merits of the execution. (This point was not insisted upon in banc). And that, if the sheriff had sold illegally, trover was not the proper form of action.

The learned judge reserved the points, and left it to the jury to say whether the warrant of attorney on which Charles Brown had obtained judgment and execution was given by way of fraudulent preference. Verdict for plaintiffs on the 1st, 3d, 4th, and 5th issues; damages 149*l.*, (the produce of the second day's sale.) Leave was given to move that the verdict against Sir T. A. C. Constable should be set aside and a verdict entered for him.

Wortley, in Michaelmas term, 1843, obtained a rule nisi accordingly.

Martin now showed cause.(a) As to the form of proceeding, *Cheston v. Gibbs*, 12 M. & W. 111, decided since the granting of this rule, shows

(a) Before Lord Denman, C. J., Patteson, Willes, and Wightman, Js.

that the action is rightly brought in trover. (*Wortley*, *contra*, said he should not dispute this.)

Then, as to the new assignment. The statement, in the fourth plea, of a levy under James Brown's writ, was matter which the plaintiffs did not propose to dispute; their case was that, after selling to satisfy that execution, the sheriff went on to sell under a void writ: therefore they could *375] answer the plea only by a new *assignment, alleging that the conversion of which they complain is not the seizure and sale of the goods mentioned in the plea, and under James Brown's writ, but the conversion of other and different goods in the declaration mentioned. To that new assignment the defendants plead only Not guilty; and upon that issue the evidence entitles the plaintiffs to recover, Not guilty putting in issue nothing but the fact of conversion. The seizure and sale, as far as they were necessary to satisfy James Brown's writ, were lawful, and this would have been the answer under the fourth plea; but, as soon as the sheriff sold more than was requisite for James Brown's execution, he became liable in trover, according to *Stead v. Gascoigne*, 8 Taunt. 527; and this view of the case is met by the new assignment. In *Batchelor v. Vyse*, 4 M. & Scott, 552, S. C. at Nisi Prius, 1 M. & Rob. 331, (a) TINDAL, C. J., said: "The law allows the sheriff to *seize* a reasonable quantity of the debtor's goods: but he must know when he has *sold* enough to satisfy the execution. *Stead v. Gascoigne*, 8 Taunt. 527, is a direct authority. The case certainly was not much argued; but it was treated as an authority by Mr. Justice LITLEDALE, in *Norman v. Bell*, 2 B. & Ad. 190." (b)

Wortley, *E. V. Williams*, and *E. Beavan*, *contra*. It is not necessary to dispute that, if the sheriff, after satisfying the valid writ, proceeded to sell under a void writ, he would be liable in trover: the question is whether that is the state of things suggested by the new assignment. The declaration alleges a seizure and *conversion of certain goods which are *376] particularly described: the plea justifies as to all those goods: then the plaintiffs new assign, that they sue in respect of goods other than and different from those stated in the plea to have been seized. The effect of this is, that the plaintiffs abandon the matter of complaint answered by the plea. [PATTESON, J. It is not correct to say that they abandon it: they allege that the matter pleaded to it is nothing to the purpose.] It is laid down in *Dand v. Kingscote*, 6 M. & W. 174, 197, that the effect of a new assignment is, "not strictly to admit the truth" of the facts averred in the plea, "but to withdraw them entirely from consideration as the subject of the action:" "the true grounds of complaint are," then, "to be sought in the explanation of the declaration contained in the new assignment." Here all the goods were seized under the valid execution: there was no evidence

(a) And see p. 333, note (b).

(b) *Stead v. Gascoigne* is not expressly cited: but see the observation of Little Dale, J., *id.* p. 191.

of a second set of goods, to which the new assignment could apply: if the plaintiffs wished to draw a distinction as to part of the goods comprehended in the one seizure, they should have replied *de injuriâ*, or by a special statement of the facts. *Barnes v. Hunt*, 11 East, 451,(a) shows that such a mode of replying would be effectual. [WIGHTMAN, J. The new assignment here is the ordinary one, and the case that in which it is ordinarily pleaded.] The effect of a new assignment where the defendant justifies a trespass on lands is thus stated in note (6) to *Greene v. Jones*, 1 Wms. Saund. 300 a, 6th ed.: "As the plaintiff avers that the place new assigned is another and different place from that mentioned in the plea, he *waives or abandons the trespass which the defendant has justified." [PAT- [*377
TESON, J. That is incorrect language. A man cannot be said to waive that for which he never sued.] Similar expressions are used in other parts of the same note. In *Norman v. Westcombe*, 2 M. & W. 349, PARKE, B., says that a new assignment "admits another trespass, all inquiry as to which the plaintiff wholly abandons." [PATTESON, J. I cannot say I think it is correct language.] In Bull. N. P. 92, it is said that, "if the plaintiff make a new assignment, and the general issue be joined thereon, the plaintiff cannot prove the defendant guilty at the place mentioned in the bar; for when the plaintiff makes a new assignment, he waives that whereto the defendant pleaded in bar; so as in truth if it be the same place, he can never take advantage thereof, and therefore if it be the same, yet the defendant ought not to rejoin that it is so, but plead not guilty, and take advantage of it at the trial." In *Pratt v. Groome*, 15 East, 235, the decision proceeded on the materiality of the plaintiff's allegation, in his new assignment, that the locus in quo was different from that mentioned in the plea: and, it being proved that they were the same, the defendant was held entitled to the verdict on the issue of Not guilty to the new assignment. In *Oakley v. Davis*, 16 East, 82, 86, Lord ELLENBOROUGH said: "How could the plaintiff new assign upon the trespass stated and justified by the plea, when he might have traversed the fact pleaded? The new assignment admits that the declaration stands well answered by the plea; but it states in effect that the defendant is under a mistake, for that the plaintiff complains of a new and *substantive trespass not answered by the plea." [PATTE- [*378
SON, J. The meaning there is that the plaintiff admits the declaration, as construed by the defendant, to be well answered by the plea.] Whether the term "abandoned" or any other be used, the effect of the new assignment is, at all events, that the grievances, as stated in the plea, are not those for which the plaintiff seeks redress: it may be that the matter pleaded is foreign to the complaint in the declaration, or that, although the matter be not foreign, yet there are circumstances connected with it which prevent its being an answer, as, for instance, if the defendant has detained goods under regular process, but longer than the law permits. Here the plaintiffs, by their new assignment, undertake to show that the goods as to which they

(a) See the observation of Littledale, J., in *Brown v. Jenkin*, 6 A. & E. 911, 919.

complain are a different set of goods from those mentioned in the plea, and which they admit to have been seized and sold as there stated.(a) [PATTESON, J. The new assignment is good in point of language; and it is a question on the evidence whether there were two sales or one. It is as if the action were trover for horses, and, the defendant justifying under a writ, the plaintiff new assigned, and said at the trial, "You seized a black horse and a grey; the black horse sold for as much as satisfied the execution; and you then sold the other: we do not sue for the black horse, but for the grey." Lord DENMAN, C. J. The question there would be upon the evidence.] The plaintiffs were bound to prove that some particular thing was sold which was not a subject of the first execution. [PATTESON, J. It comes to the question whether, when a sheriff has two writs of execution,

*379] and, after selling enough to satisfy the first, proceeds *with the sale, he must not be taken to sell under the second.] "As soon as" the goods "are seized, they are, in point of law, in his custody under all the writs which he then has; and, when he sells them, he sells, in point of law, under all the writs:" *Drewe v. Lainson*, 11 A. & E. 529, 537, judgment of the court. The sale is continuous and not divisible. If enough goods to satisfy the first execution were sold on the first day, but part of them were accidentally destroyed or lost, the first execution creditor might demand the proceeds of the goods sold after the first day, until he was satisfied; and the sheriff must be prepared to meet such demand, though he might perhaps be liable in an action for negligence by the second creditor, if he, in consequence, suffered loss. *Cur. adv. vult.*

Lord DENMAN, C. J., on a subsequent day of this vacation, (July 6th,) delivered the judgment of the court.

The only questions in this case arose upon the new assignment upon the fourth plea. The declaration was in trover in the usual general form. The defendant Constable, in the fourth plea, states that a writ of fi. fa. at the suit of James Brown, endorsed to levy 79*l.* 4*s.* 9*d.*, was delivered to him (he being sheriff of Yorkshire) before the issuing the fiat against John Brown; and that he, as sheriff, before the fiat, seized and took in execution the goods in the declaration mentioned, for the purpose of levying the money mentioned in that writ, and did, before the fiat, by sale thereof levy

*380] the said money as by the said writ he was commanded. To this *plea the plaintiffs new assigned that they brought their action, not in respect of goods seized, taken and sold under the writ mentioned in the plea, but for goods and chattels other and different than the goods and chattels which were seized, taken and sold under the said writ in the fourth plea mentioned. To this new assignment there was a plea of Not guilty. (His lordship then stated the material facts proved on the trial, as at p. 373, ante.)

The defendant contended: 1. That the plaintiffs, by new assigning, had admitted that all the goods mentioned in the declaration were covered by the plea, and that they ought not to have new assigned, but traversed the

(a) See note (f) to *Greene v. Jones*, 1 Wms. Saund. 299 a, 6th ed.

allegation in the plea that the goods were taken and sold to satisfy the writ at the suit of James Brown : and, 2. That the sale, though in two days, was in fact but one sale, and that sale under the execution at the suit of James Brown ; for that, although enough was raised at the first day's sale to satisfy James Brown's execution, the sheriff might nevertheless sell more under that writ in order to protect himself, in case, after the sale, and before delivery of the goods sold to the purchasers, some unforeseen loss, as by fire or thieves, might occur, which would render the produce of the first day's sale insufficient to satisfy James Brown's writ. Upon both of these points, however, our opinion is in favour of the plaintiffs.

We think a new assignment was the proper mode of pleading in this case on the part of the plaintiffs. The declaration is general, and may apply to any goods within the number and description stated in it. The defendant says that he seized, took and sold the goods mentioned in the declaration under a writ of *fi. fa.* at the suit of James Brown, and so justifies.

This *apparently* answers the declaration ; for the defendant did seize, [*381 take and sell some goods, within the number and description in the declaration, under that writ ; and, the declaration being general, it may be that the goods seized and sold under that writ were the goods for which the plaintiff brought his action. But the plaintiff, admitting that the defendant did seize and sell certain goods within the number and description of these stated generally in the declaration, says by his new assignment that the goods in respect of which he brought his action, and which he named in his declaration, are not those seized and sold under James Brown's writ, but other goods. And this is the proper mode of pleading in such a case, a new assignment being used to explain matters alleged generally in the declaration, and only *apparently* answered by the plea.

The question then becomes one of fact, whether all that was sold at *both* sales was sold under the writ at the suit of James Brown : and upon this part of the case the second point made by the defendant arises.

The cases of *Stead v. Guscoigne*, 8 Taunt. 527, and *Batchelor v. Vyse*, 4 M. & Scott, 552, are direct authorities that, if a sheriff sell more goods than are sufficient to satisfy an execution, he is liable in trover in respect of the excess. Whether he sold more than under the circumstances was necessary, is a question of fact in each particular case ; and, in the present, there is no doubt that the produce of the first day's sale was sufficient to satisfy the execution at the suit of James Brown : and we are of opinion that the sale on the second day was not warranted by James Brown's writ, and that the goods sold on that day cannot be considered sold [*382 under that writ. We also think that, *prima facie*, a sheriff's sale is to be considered to be for ready money and immediate delivery, and that the sheriff is not justified, after he has sold as much as apparently satisfies the writ, in going on to sell more upon a speculation that it is possible that actual delivery of such goods as he has already sold may be prevented by some loss or accident for which he is not answerable.

This rule therefore will be discharged ; and the verdict for the plaintiffs upon the new assignment will stand. Rule discharged.

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*ELWOOD v. BULLOCK.

The council of a borough made the following by-law, by virtue of a charter empowering them to make by-laws, and of stat. 5 & 6 W. 4, c. 76, s. 90.

That no person should erect any booth for the purpose of any show or public entertainment in any public place within the borough without license from the mayor, which license should not be given at or for any other time than during the annual fairs, if three inhabitant householders, residing within one hundred yards of the place intended to be used, should have previously memorialized the mayor in writing to withhold such license : and that any such license given at or for any other time than during the said fairs should be revoked by the mayor and become void, if and so soon as three inhabitant householders residing within one hundred yards, &c., should memorialize the mayor in writing to revoke the same ; such last-mentioned memorial to be presented within forty-eight hours after the building of such booth should have been commenced, and the revocation to be notified forthwith to the party employed or interested in the building : and any person erecting or continuing a booth in contravention of the by-law to forfeit a sum not exceeding 5*l*.

Held, an unreasonable by-law, and wholly void, though duly published and notified to a secretary of state and not disallowed.

To a count in trespass for breaking down and removing plaintiff's booth, defendant pleaded that, before and at the time when, &c., there was a public highway, *through, over and along a close* called A., for all the liege subjects, &c. ; and that the booth had been and was wrongfully erected and standing *in and across the said highway*, and obstructing the same, wherefore defendant, being a liege subject, &c., and having occasion to use the said highway, committed the alleged trespasses, in order to remove the obstruction. Replication : That the said close is in the borough of B., which is an immemorial borough, and that an immemorial fair for the sale of all kinds of goods was, for three weeks from a certain day in every year, holden in the said close, that is to say on certain parts thereof used for that purpose, but *leaving open a sufficient part of the said close, and also of the said highway, for the subjects, &c., to go, return, pass, &c., in and along the same highway*. And that there was an immemorial custom in the said borough, that every liege subject using the trade of a victualler bath, during the said fairs, been used, &c., for the purpose of carrying on his said trade, to enter upon any part of the said close used for the purpose of such fair, but leaving as aforesaid, and, for carrying on his said trade, to erect a booth there, and to continue such booth until a reasonable time after the end of such fair, paying a reasonable compensation to the owner of the soil. And that plaintiff, being a liege subject and a victualler, did, during such fair, erect his said booth on one of the parts of the said close then and theretofore used for the fair, (leaving as aforesaid,) according to the custom, and continued such booth there till defendant, during the fair, committed the trespasses.

Held, on demurrer, that the custom was reasonable, for that a highway might have been granted before legal memory, subject, in parts, to interruption for a beneficial public purpose and for a limited time.

And that the plaintiff was right in replying specially as above, and could not have traversed the existence of a highway over the locus in quo, because, consistently with the custom, that spot might sometimes be used as a highway and sometimes not, and it did not, by temporary occupation under the custom, cease to be a highway.

Issues being joined in law and in fact, the plaintiff, after judgment for him on the former, the latter being untried, obtained a rule to discontinue on payment of costs. On taxation, the master made his allocatur for the plaintiff's and defendant's costs respectively, not striking a balance. The plaintiff, to whom the larger sum was due, took out execution for the balance between his costs and the defendant's.

Held, that he was entitled to his costs of demurrer notwithstanding the discontinuance. And The court refused, on motion, to set aside the execution as irregularly issued for a balance instead of the gross sum awarded for costs.

TRESPASS. The declaration stated that defendant, on, &c., with force and arms, at Bury St. Edmund's in Suffolk, in a certain close there called

the Angel Hill, *broke and entered a certain booth or building of plaintiff, then standing, erected and being in the said close, and [*384 commonly called and known as The Harp, and before that time used by plaintiff for the purpose of therein selling liquors, and then and there took down, pulled down, &c., and destroyed the said booth, and broke to pieces, took, and carried away and converted, the materials; and also seized and took plaintiff's goods and chattels, to wit, &c., there then found, &c., of a large value, &c., and broke, &c., and took, carried away and converted the same: by means whereof the goods were lessened in value, &c., and also, by means of the booth being pulled down, &c., plaintiff was prevented from selling divers large quantities of liquors and provisions therein, and from exercising and carrying on his trade of a victualler therein, and thereby making gains, &c.

Plea 2. That the borough of Bury St. Edmund's is, and from time whereof, &c., hath been, an ancient borough; and that the burgesses thereof, until the making of an act passed, &c., (5 & 6 W. 4, c. 76,) and until the first election of councillors under the said act, had been and were a body corporate and politic by the name of "The Alderman and burgesses of Bury St. Edmund's in the county of Suffolk," and from thence hitherto have been, and still are, a body corporate, &c., by the name of "The Mayor, aldermen and burgesses of Bury St. Edmund's." That, by letters patent, April 3d, 4 Ja. 1, (profert,) the king granted to the said corporation and their successors that the alderman for the time being, and the assistants of the said borough for the time being, or the greater part of them, and the chief burgesses for the time being, or the greater part of them, and the common council for the time being, or the greater part *of them, (of [*385 whom the alderman for the time being was to be one,) upon public warning thereof to be given to congregate themselves together, "should have full power and authority to make and constitute and ordain from time to time good, wholesome, profitable, honest and necessary laws, statutes, constitutions, decrees and ordinances reasonable in writing whatsoever, which to them or the greater part of them as aforesaid, according to their discretions," &c., "should seem to be for the good regimen and government of the borough aforesaid and all and singular officers," &c., "inhabitants and residents of the borough aforesaid, in their offices," &c., "arts and businesses within the borough aforesaid and liberties and precincts of the same for the time being, which they should have, bear and use for the further public good, common profit and good government of the borough aforesaid, and the victualling the same, and for other the things and causes by any manner of way touching the said borough. As by the said letters patent," &c. The plea then averred acceptance of the letters patent, which are still in force, except so far as the same are repealed or annulled by stat. 5 & 6 W. 4, c. 76. And that, after the passing of that act, and before the time when, &c., and more than twelve calendar months before the commencement of this suit to wit on, &c., defendant, being duly qualified, had

been elected mayor, &c., and had subscribed the declaration, &c. ; and that he continued mayor until after the committing of the supposed trespasses, to wit until, &c. ; and was during all that time a justice of peace for the borough, and had duly taken the oaths required in that behalf. The plea then stated the election, more than twelve calendar months before action
 *386] brought, of aldermen, and of councillors (among *whom was the defendant) duly qualified, who respectively subscribed the declarations, &c., and who remained in office until after the committing, &c., and which aldermen and councillors constituted and acted as the council of the borough on the 20th February, 1843, and until after the committing, &c. And that, while they so constituted such council, and before the time when, &c., to wit on February 20th, 1843, a quarterly meeting of the said council for the transaction of general business was duly holden, &c., (the plea stated particularly the notices and the other due preliminaries to the holding of such meeting.) And that more than two-thirds of the whole number of the council, to wit, &c., naming them,) were present at the said meeting and at the making of the by-laws after-mentioned ; and defendant presided, &c. And thereupon it then seemed meet to the said council to make, &c., and they did then accordingly, to wit on, &c., at the said meeting, by virtue and in pursuance of the act of parliament in such case, &c., and of all powers, &c., granted by any charter or charters to the mayor, aldermen and burgesses, &c., or by law inherent or otherwise vested in them or the said council in that behalf, duly make, &c., and declare divers, to wit twelve, by-laws, statutes, &c., reasonable, in writing, for the good rule, &c., (a) of the said borough, and for the prevention, &c., of divers nuisances therein which were not already punishable in a summary manner, &c., and by such by-laws appoint divers fines which they deemed necessary for the prevention, &c., of such offences, no fine so appointed exceeding 5*l*. And by one, to wit the eleventh, of which by-laws it was and is ordained and declared :

*387] **“*That no person should thenceforth erect any booth or place any caravan, for the purpose of any show or public entertainment, in any public place within the said borough without the license of the mayor thereof ; and that such license should not be given at or for any other time than during the time of the annual fairs, if three inhabitant householders, residing within one hundred yards of the place intended to be used, should have previously memorialized the said mayor in writing to withhold such license : and that any such license given at or for any other time than during the time of the said fairs should be revoked by the said mayor and become void, if and so soon as three inhabitant householders, residing within one hundred yards of the place for which such license should be granted, should memorialize the said mayor in writing to revoke the same : provided such memorial as last mentioned should, in the case of any booth or other like erection being sought to be set up, be presented to the mayor

(a) See stat. 5 & 6 W. 4, c. 76, s. 90.

within forty-eight hours next after the building of any such booth or erection should have been commenced ; and that the revocation of such license should forthwith be notified by the mayor to some person or persons employed or interested in the building of any such booth or other erection : And that, in case any person should erect or cause to be erected wholly or partially any booth or other like erection or place, or cause to be placed any caravan for the purpose of any show or public entertainment, in any public place within the said borough, without the license of the mayor, or, after the revocation of any such license should have been notified to him, should refuse or neglect to remove such caravan or the materials of such booth or other like erection within the time prescribed *by the said mayor in that behalf, such person should forfeit and pay a sum not [388 exceeding 5*l.* ; and that in every such case it should be lawful for the said mayor, whether the said penalty should have been sued for or not, to cause every such booth or other like erection, whether completed or not, and every such caravan, to be removed from and out of the limits of the said borough : provided that that by-law should not be construed to give any greater effect to the license of the said mayor than the same would have had if that by-law had not been made." As by the said laws, &c., will (among other things) fully appear.

The plea then averred notice of the said by-laws to one of the secretaries of state, and publication by affixing on the door of the town hall ; (a) and entry and signing of minutes of the said proceedings in council ; (b) that the by-laws were not disallowed, &c. within forty days (a) after notice and publication ; and that, immediately after the expiration of forty days, &c., to wit on, &c., and before the time when, &c., the same came into effect.

The plea then went on to state that, before and at the time of the making of an act, &c. (the Parliamentary Boundary Act, 2 & 3 W. 4, c. 64,) the close called the Angel Hill, in the declaration mentioned, was, and from thence hitherto hath been, and still is, part of and situate within the said borough, " and the same close was and is a common and public place and queen's highway, situate in the middle of the said borough ; of all which premises," &c. (notice to plaintiff before the time when, &c.) And defendant further saith that plaintiff, disregarding the said by-law, afterwards, and before the said time when, *&c., to wit on, &c., without the leave [389 or license, and against the will and consent, of the defendant, so being such mayor as aforesaid, unlawfully erected, put up and placed, and caused to be erected, &c., the said booth in the declaration mentioned in and upon the said close called the Angel Hill, so being such common and public place and highway as aforesaid, for the purpose of public entertainment, and of causing, procuring, and encouraging public dancing, lewdness, drunkenness, and debauchery in and about the said booth : and plaintiff then also put and placed the said goods and chattels in the declaration mentioned in and upon the said booth for the purpose aforesaid ; and then,

(a) Stat. 5 & 6 W. 4, c. 76, s. 90.

(b) *Ib.* s. 69.

to wit on, &c., opened the said booth for the purpose aforesaid, and caused the same to be kept and continued open for such purpose from thence until and at the said time when, &c.: and plaintiff did during all that time unlawfully and injuriously keep, maintain, and continue the said booth an ill governed and disorderly booth, and for his own lucre and gain did unlawfully and wilfully cause and procure divers and very many dissolute and debauched persons, as well men as women, of evil name and fame and of dishonest conversation, and as well inhabitants of the said borough as others, to frequent, assemble and come together with drums and trumpets, and other instruments at and in and about the said booth at unlawful times, as well in the night as in the day-time, and then and there to be and remain beating drums, blowing trumpets, dancing, drinking, tippling, whoring, and misbehaving themselves, and raising and making riots, affrays, uproars, loud noises and disturbances, for divers long spaces of time, to the sub-

*390] version of the good rule, order and government of the said *borough, and to the great annoyance and damage and common nuisance of all the liege subjects, &c., there inhabiting, being, residing and passing, to the evil example, &c., and in breach of the peace of our said lady the queen: whereupon defendant, so being such mayor of the said borough as aforesaid, then, to wit on, &c., gave notice to and required plaintiff to discontinue and put an end to such nuisance, and remove the said booth, together with the said goods and chattels so put and placed therein and thereupon as aforesaid, by two of the clock in the afternoon of the 12th October then next following, the same being a sufficient and reasonable time in that behalf: but plaintiff wholly refused so to do, and, on the contrary thereof, until and after the expiration of the said last mentioned period of time, and until and at the said time when, &c., kept and continued the said booth so erected in and upon the said close, and kept and continued the said goods and chattels therein and thereupon for the purpose aforesaid, and kept and continued the said booth open for the purpose aforesaid; and during all the time last aforesaid kept, maintained and continued the said booth in the ill governed and disorderly manner aforesaid, and caused and procured the said improper and disorderly conduct to be continued at, and in, and about the said booth: whereupon defendants, so being such mayor and justice of the peace as aforesaid, afterwards and after the expiration of the said period of time so prescribed for the removal of the said booth, goods and chattels as aforesaid, at the said time when, &c., in order to abate and remove the said nuisance, and to restore and preserve the peace and the good rule, order and government of the said borough, and in pursuance of the said by-law, *broke and entered, &c., and seized, *391] and took, &c. (justifying in the usual form,) doing no unnecessary damage, &c., and as the defendant lawfully, &c. Which are the supposed trespasses, &c. Verification.

Demurrer, assigning as a cause, among others, that the eleventh by-law "is an unreasonable and improper by-law, and is in restraint of trade, and

always was, and is, invalid and void, and of no force or effect whatsoever." Joinder in demurrer.

Last plea. That, before and at the said time when, &c., there was, and of right ought to have been, a certain common and public queen's highway into, through, over and along the said close called the Angel Hill, for all the liege subjects, &c. to go, return, &c., on foot and with horses, &c. and carriages at all times of the year at their free will and pleasure; and that the said booth and the said goods and chattels, just before the said time when, &c., had been respectively wrongfully erected, put up and placed, and were, at the said time when, &c., respectively wrongfully standing, erected, being, and remaining, in and across the said highway, and stopping up and obstructing the same, so that, without removing the said obstructions, and committing the said supposed trespasses, the liege subjects, &c. could not then pass and repass in and along the said highway as they were used, &c., and of right, &c. Wherefore defendant, being a liege subject, &c., and having occasion to use the said highway, at the said time when, &c., in order to remove the said obstructions, and to open the said highway, broke and entered, &c. (justification in the usual form.) Verification.

Replication. That the said Bury St. Edmund's in the declaration mentioned now is, and from time whereof, *&c. hitherto hath been, an ancient borough; and that the burgesses thereof, before and until [*392 the time of the making of a certain act, &c. (5 & 6 W. 4, c. 76,) and until the first election of councillors under the same, had been and were a body corporate, &c., to wit by the name, &c. (stating the names of incorporation before and after the statute:) and that, from time whereof, &c. hitherto, the said close called the Angel Hill hath been and still is situate within the said borough: and that, from time whereof, &c., on certain days in each and every year, to wit on 25th September, according to the old style and computation of time heretofore used in this kingdom, being the 6th day of October, according to the new and present style and computation of time, and from thence for three weeks then next following, a fair for the buying and selling of all kinds of goods and merchandises hath been, and of right ought to have been, and still of right ought to be, holden in the said close called the Angel Hill in the said borough, that is to say on certain parts thereof used for that purpose, but leaving and so as to leave open, unobstructed and unencumbered a sufficient part of the said close in the said declaration mentioned, and also of the said highway in the said last plea mentioned, for the subjects of this realm, with their horses, carts, and carriages, to go, return, pass and repass in and along the same highway in the said last plea mentioned, freely and without hindrance or obstruction. And that, from time whereof, &c. hitherto, and before and at the time when, &c., there hath been, and of right ought to have been, and still of right ought to be, a certain ancient and laudable custom within the said borough and there used and approved of, that is to say, that every liege subject of this realm exercising the trade or *calling of a victualler [*393

hath, during the said fairs, that is to say on the said 25th September, &c., oeing the said 6th day of October according, &c., and from thence for three weeks then next following in each and every year during all the time aforesaid, been used and accustomed, for the purpose of carrying on his said trade or calling at the said fairs, to enter, and of right ought to have entered, and still of right ought to enter, into and upon any of the said parts of the said close called the Angel Hill used as aforesaid for the purpose of holding the said fairs, but leaving as aforesaid, and, for the more conveniently there carrying on his said trade or calling at and during the said fairs, to there erect a booth, and to put and place therein provisions, goods and chattels fit and proper for the more conveniently and beneficially there carrying on his said trade or calling, and to keep and continue such booth so erected, and such provisions, goods and chattels, fit and proper as aforesaid, so put and placed from thenceforth until a reasonable time after the end of each such fair as aforesaid for removing and carrying away from and off the said close such booth, provisions, goods and chattels; yielding and paying therefor to the owner or owners of the soil of the said close called the Angel Hill a reasonable compensation in that behalf, when the same should be lawfully demanded. Averment that, before, and at, and after the said time when, &c., one of the said fairs was held, A. D. 1843, in and on the said close called the Angel Hill, to wit on certain parts thereof then and theretofore used for that purpose, and leaving as aforesaid, that is to say on 25th September, &c., being, &c., and for three weeks, &c. And that plaintiff, then being a liege subject of this realm, and then exercising the *trade

*394] or calling of a victualler, for the purpose of exercising and carrying on his said trade or calling at the said last mentioned fair, did, according to the said custom in this plea mentioned in that behalf, during the last mentioned fair, that is to say during such three weeks as last aforesaid, to wit on, &c., enter into and upon one of the said parts of the said close called the Angel Hill then and theretofore used for the purpose of thereon holding the last mentioned fair, and, for the more conveniently there carrying on his said trade or calling at and during the said last mentioned fair, did, according to the said custom in that behalf, then and there, to wit on, &c., on such part as last aforesaid of the same close, but leaving as aforesaid, erect a certain booth, being the said booth or building in the said declaration mentioned, and being a proper booth, and such a booth as the plaintiff might erect according to the said custom in this plea mentioned in that behalf, and put and placed in the said booth the said goods and chattels in the said declaration mentioned and alleged to have been seized and taken by the defendant, the same then being goods and chattels fit and proper for the plaintiff to put and place in his said booth for the more conveniently and beneficially carrying on his said trade or calling therein; and the said plaintiff kept and continued the said booth so erected as aforesaid, and the last mentioned goods and chattels so put and placed as aforesaid, from thence until the said defendant, during the last mentioned fair and before

the same was ended, and during such three weeks as last aforesaid, and at the said time when, &c. in the said declaration mentioned, to wit on, &c. in the said declaration mentioned, unlawfully broke and entered the said booth of "plaintiff" as in the declaration mentioned, used by plaintiff as therein mentioned, and then and there took down, &c., (restating [*395 the trespasses complained of in the declaration,) in manner and form as the plaintiff hath above in his said declaration in that behalf complained, &c. Averment, that, upon the occasion of his entering the said part of the said close as in this plea mentioned, and erecting the said booth as last aforesaid, and putting and placing in the said booth the said goods and chattels as last aforesaid, he the plaintiff was, and from thence hath been, and still is, ready and willing to pay the said mayor, aldermen, and burgesses of Bury St. Edmund's aforesaid, then and still being the owners of the soil of the said close, a reasonable compensation or sum of money in that behalf, to wit the sum of 5*l*. Verification.

Demurrer, assigning for causes: That the plea shows a general and unlimited highway and right of way over the Angel Hill, and every part thereof, for all the liege subjects, &c., at all times, &c.; and the replication purports to admit such right of way: nevertheless, it does in effect traverse and deny the same by allegation of matter showing that, from time whereof, &c., there has not and could not have been such right of way, inasmuch as the replication alleges an immemorial and lawful holding of an annual fair, &c., and an immemorial custom, &c., the lawful holding and exercise of which are inconsistent with the rightful use of the said highway and right of way: That the replication does not state that the said highway has been legally stopped up, &c., or put an end to: That, if plaintiff meant to contend that his said booth and goods and chattels were not erected and put on, or obstructing, the said highway, he ought either to have replied according to the "fact, or to have new assigned, or else to have replied as [*396 to part and new assigned as to other part: Also that the replication does not in any manner specify or show what parts of the said close were, from time to time, used for the purpose therein mentioned, nor describe the parts so used: Also that the replication does not show by what authority the particular parts of the said close, from time to time used for the said purpose, were appointed and chosen for that purpose; and it cannot be gathered from the replication that the same and identical parts of the said close were from time immemorial used for the said purpose, but nevertheless such replication does not allege or show any authority for at any time changing the place of holding the said fair: Also that the subject matters of the replication are inconsistent with the enjoyment as of right, and with the simple fact of enjoyment, of the said highway and right of way in the last plea stated: Also that the replication is repugnant and self-contradictory, inasmuch as it states the lawful and actual holding of fairs on the said close and highway for the purposes therein mentioned, but leaving unobstructed a sufficient part of the close and highway for the subjects, &c., with their

horses, &c., to go, return, &c., freely and without hindrance, &c., and further states a custom used and exercised, &c., (reciting the material allegations of the plea as to the custom,) whereas it is impossible for the said fairs ever to have been so holden, or for the said persons ever to have erected, or so to have erected, put or placed, such booth, provisions, goods or chattels, or so to have kept or continued the same, without causing hindrance and obstruction in and of the said public highway: Also that it
 *397] does not allege that the booths, &c., which it is alleged to have been customary to erect, put, place, &c., or that the said booth, &c., of plaintiff, or any of them, were, in fact, erected, put, placed, &c., in the said close without causing hindrance and obstruction of and in the said highway: Also that the replication admits that the said annual fairs, and the said booths, &c., which it is therein stated to have been customary to erect, &c., and the said booth, &c., of plaintiff, respectively, were and caused hindrances and obstructions to the liege subjects, &c., having occasion to go, return, &c., in and along the said highway, but does not attempt to justify such hindrances, &c.: Also that plaintiff has not shown in what manner the compensations in the replication mentioned, or either of them, were or could be a compensation to the liege subjects, &c., having right and occasion to use the said highway: Also that the replication does not with certainty either admit or deny the existence, at the time when, &c., of the said highway, and of the said obstructions or either of them, and neither positively traverses, nor confesses and avoids, the last plea: Also that the replication amounts to a traverse or denial of the last plea, and as such ought to have concluded to the country: And that the replication is in other respects, &c. Joinder.

The demurrers were argued last term.(a)

Gunning for the plaintiff. The by-law is bad, because it directs imperatively that, except during fair times, the license to erect a booth shall be withheld if three inhabitant householders, residing within one hundred yards
 *398] of the place intended to be used, shall have memorialized the mayor to withhold such license; and, if granted, it shall be revoked, if and so soon as three such householders shall memorialize. This leaves no discretion to the public officer. [Lord DENMAN, C. J. And does not make the withholding of the license depend on the party's own conduct.] It does not require that a reasonable objection shall be made, or the owner of the booth called upon to show cause against the refusal or revocation. The memorialist may be a rival in business. [Lord DENMAN, C. J. Or may be offended because the party does not deal with him.] And the objector need not be even an inhabitant of the borough.

(The court gave judgment, as to this demurrer, on the above objection only: but several were stated; namely: 1. That the prohibition to erect a booth in "any public place" within the borough was too indefinite, and might extend to places which were not public highways, and which, there-

(a) June 7th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

fore, could not legally be included in the prohibition. 2. That the by-law professed to give a power of prohibition which might take effect though in restraint of trade, or tending to monopoly; and such a by-law was invalid; Com. Dig. *By-law* (C 3); *Trade* (D 2); *Ipswich Tailors' Case*, 11 Rep. 53 a, and authorities there collected, p. 53 b, note (A), Fraser's ed.; *Case of Monopolies*, 11 Rep. 84 b, 87 b. 3. (This was the objection first stated, and on which the court gave judgment.) 4. That the words "any booth or other like erection" are ambiguous and too vague. 5. That the fine for erecting a booth without license, or not removing it within the time prescribed after revocation, should *have been fixed by the by-law; *Wood v. Searl*, J. Bridgm. 139. Stat. 5 & 6 W. 4, c. 76, s. 90, [*399 enables the council to appoint fines by their by-laws, within the amount of 5*l.*, but not to delegate the power of appointing them. 6. That the power to remove booths or caravans out of the limits of the borough cannot be necessary; and the by-law gives no direction or limit as to the place to which they shall be carried.)

If the by-law is bad in part, it is bad altogether; Com. Dig. *By-law* (C 7). And, if originally defective, it does not gain validity by having been affixed on the town hall and submitted to the secretary of state and not disallowed; *Stationers' Company v. Salisbury*, Comb. 221.

The court desired to hear the other side as to the by-law, before considering the demurrer to the replication.

W. H. Watson, contrâ. 'The by-law here is not analogous to those which have formerly been under consideration, originating in local charters. 'This is a regulation purely of police, framed under the general act 5 & 6 W. 4, c. 76, s. 90, and receiving a public sanction by being affixed on the town hall and laid before a secretary of state. Its object is, not to influence trade, but to regulate something which must, by its nature, be more or less a nuisance in any town. That the erection of booths should be controlled by some one is clearly necessary: the by-law gives that contrôl to the mayor; and it is only at times other than those of the annual fair that he is bound to exercise it on the *application of three inhabitants. Nor [400 is it unreasonable that at periods other than the fair times, and at which booths are not ordinarily wanted, persons resident in the neighbourhood, who are the best judges of the convenience or inconvenience, should have the privilege of objecting to them. A power to interfere with the opening of shops would be very different. It is argued that such a by-law makes the liberty of having a booth depend on the good will of individuals; but that is no sufficient objection to a law made for the prevention of nuisances. If the law be *primâ facie* reasonable, the court will not hold it void because the power may be unreasonably exercised. An argument from possible abuse was suggested in *Tyson v. Smith*, 6 A. & E. 745,(a) where a customary right was claimed for every liege subject, being a victualler, during certain fairs, to erect a booth on that part of the waste

(a) Affirmed on error, in Exch. Ch., 9 A. & E. 406.

of the manor on which the fairs were held; and it was said that, if the custom were good, so many booths might be erected at the fair as would impede business: but this court held such an apprehension "altogether unreasonable and extravagant." (The rest of the argument in support of this plea is rendered immaterial by the judgment of the court.)

LORD DENMAN, C. J. We all think the third objection fatal. The whole by-law must be taken together, and cannot stand if a part is bad. Now it is clearly unreasonable that three inhabitants of a neighbourhood should have power to prevent the erecting or continuing of a booth, merely because they think it ought not to be *allowed. There are some by-laws
 *401] enabling parties to do acts prejudicial to others, on inquiry, or under other restrictions, which may be very reasonable; but here an absolute power of prohibition or removal is claimed, and cannot be supported. Mr. *Watson* argues that this is an enactment of police, and not in restraint of trade: but it is a police regulation executed by restraining trade. That such a regulation effects the purpose contemplated is an argument which might legalize any exercise of power. The judgment on this demurrer must be for the plaintiff.

PATTESON, J. The effect of this by-law is, that a party may set up a booth, and then three persons, merely upon their own will and pleasure, order the mayor to remove it. That is clearly unreasonable.

WILLIAMS, J. This by-law goes to a greater length than any rule of policy can warrant. The argument that some regulation of police is carried into effect by it might be urged for preventing the erection of a house. This by-law might be used to prohibit, not only things having the consequences described in the plea, but things of an indifferent or even salutary kind. It includes "any booth," not only for the purpose of a show, but for that of "public entertainment," which may be scenic, or may be the supplying meat and drink for man and horse coming to the market, in which surely there is nothing unlawful. The regulation goes to an extent quite unreasonable. The will and pleasure, to which the license is made subject, may be that of the individual having the greatest personal interest in its being withheld.

*COLERIDGE, J. Whether a by-law is for the regulation of trade
 *402] or for purposes of police, it must be reasonable and just. It is said that the object here is the prevention of nuisances. Suppose a party were indicted for such a nuisance: the evidence of three neighbours stating that they were annoyed would be a *prima facie* case; but others might say that the thing complained of was a benefit to the neighbourhood; and it would be for a jury to decide. But under this by-law any three persons living within the prescribed limit may memorialize, and *ipso facto* prevail. Such a law is clearly unreasonable.

W. H. Watson was then heard in support of the demurrer to the replication. First, the replication is bad in form. The last plea alleges a highway for all the liege subjects, &c., to go, &c., "at all times of the year." If

there was any time, however short, during which they might not use the way, this plea is not true. But the plaintiff says there were times during which the way might lawfully be obstructed. Then he should have traversed the alleged right of way. *Tyson v. Smith*, 6 A. & E. 745, S. C., in Exch. C., 9 A. & E. 406, was a different case from this; there the right asserted was to occupy part of the lord's waste; the owner of the booth claimed against the lord's lessee, not against the public. [PATTESON, J. The plaintiff here does not deny the right of way: he only says that at certain times of the year persons attending the fair may limit you to a particular course. If there could be no such limitation of a right of way, no market could be held in the street of a town, which, however, is constantly done. And, if "a market may be so held, I do not see why a fair may not, provided the way is not blocked up; and the plaintiff here does not allege a right to do that."] The plea asserts, in effect, a right of way over the very spot where the booth was placed; the replication must be taken to allege a custom to destroy the right of way pro tanto. Then the right, so far as the plea brings it in question, should have been traversed. The plaintiff should have said that he was not obstructing what was the highway. [PATTESON, J. That would be, that, at the particular time, the locus in quo was not part of the highway.] It would. The replication, as it stands, neither denies nor confesses and avoids the right of way. The plaintiff might have replied a custom to exclude the public at certain times, without this, that at the time when, &c., the public had a right to pass over the locus in quo. A new assignment *extra viam* would not apply to this case. [PATTESON, J. There it would be denied that any way at all existed over the locus in quo. Here a way does exist at times. If the plaintiff had merely traversed the existence of the highway as pleaded, he must have been beaten, for the highway is made to extend over every part of the close.] In *Arlett v. Ellis*, 7 B. & C. 346, (a) an action of trespass, the defendant justified in respect of a customary right of common throughout the close in which, &c.: the plaintiff took issue on the custom, and proved a right in the lord of the manor (under whom he claimed) to enclose parcels of the waste, and that the locus in quo was comprised in a parcel enclosed by virtue of such right; and the pleading was held to be correct. [PATTESON, J. The plaintiff here could not have replied that the trespass was committed *extra viam*, unless the alleged right of way had been limited to a particular line. I do not see what he could have done but reply as he has.] Secondly, a substantial objection is that the custom pleaded is bad. It would limit public rights for a private benefit. Supposing that the way had been dedicated to the public after the fair came into existence, the right of way could not have been pleaded as immemorial. But, by the replication, both appear to be so. [Lord DENMAN, C. J. Both rights may have arisen under the same original grant. COLERIDGE, J. The words in the replication, "leaving" "a sufficient part" "of the said highway" "for

(a) See judgment of Littledale, J.

the subjects," &c., "to go, return," &c., import that the highway is at least as old as the custom.] If the highway already existed, the crown could not legally grant a fair to be holden upon it. Supposing the fair and the way contemporaneous, the grant must have been, not of a right of way at all times, but a right of way limited, and subject to the fair; a way to be enjoyed at certain times. [PATTESON, J. The plaintiff does not say that this is not a way at all times, but only that it is not a way at all times over all parts. COLERIDGE, J. It may be said, however, in your favour, that we cannot see by this record that Angel Hill is different in extent of space from any other high road.] The claim is, on the part of certain persons, to exclude at particular times from what is confessedly the highway. It is like the claim in *Fowler v. Sanders*, Cro. Jac. 446, where, to an action on the case for laying logs in the highway, and thereby straitening it, to plaintiff's damage, the defendant *pleaded a custom for all the inhabitants of the town of Coggeshall, having ancient houses, to lay logs in waste places of the way before their doors for fuel, leaving sufficient passage for chariots, horsemen and footmen; but this court held "that the prescription to make a nuisance is not good." [PATTESON, J. That is not quite the same as a custom for all the liege subjects, being victuallers, to exercise certain rights in a fair.]

Gunning, contrà. This is a claim of right for the benefit of the public, not a prescription in favour of individuals, as in the case just cited. The custom is for the purpose of bringing essential commodities to a fair; and every subject of the realm, exercising the trade of a victualler, may take advantage of it. The argument on the other side would prevent any fair or market being held on the highway, unless shown to have existed before the highway. [Lord DENMAN, C. J. Supposing the custom good, should not you have pleaded that the locus in quo was not a highway at the time of the trespass, by reason of your having erected the booth?] That would have been wrong. The place continued a highway. Perhaps, if the plaintiff had been desired, after a time, to remove his booth, he might have been liable for not doing so. But, if he had been indicted for placing his booth on the highway at the time in question, and had shown that the locus in quo was so used at particular times, (of which this was one,) according to the averments in the present replication, he could not have been convicted. The public cannot claim to have any highway entirely clear at all moments.

A carriage may stand still on *the highway. [PATTESON, J. It is *406] there for the purpose of passage; and if it remained for an unreasonable time it would be a nuisance.] The plaintiff here could not have directly traversed the allegation that this was a highway, or that he obstructed it, without being defeated. The present replication is the only one which would not have been either argumentative or no defence. As to the custom, the case is like *Tyson v. Smith*, 6 A. & E. 745, S. C. in Exch. C., 9 A. & E. 406. [PATTESON, J. In that case the right to hold a fair was not contested. Here, the fair itself is said to be illegal, because the place

is one over which there is a right of way. The market at Norwich is held in such a place.] There is nothing here to show that the fair was not at least coeval with the highway; and, if so, the right of way may well have been subject to the holding of a fair, as the court considered the right of passage to have been granted subject to toll in *Lord Pelham v. Pickersgill*, 1 T. R. 660.

W. H. Watson, in reply. A market could not be granted in a place where a highway existed: the public could not, in such a place, acquire those rights which are essential to the grant: and, if the lord had professed to remove a former market to that site from a different one, the old market would not have been superseded, nor the new one legal: *Rex v. Starkey*, 7 A. & E. 95. The plaintiff contends that his act of obstruction is not a nuisance, but only a user of the way; and this though it may continue for three weeks. [Lord DENMAN, C. J. We do not quite go with that argument.] If the way was *subject to the fair at the time of the alleged trespass, there was no way at that time. If the fair existed before [*407 the close was used as a way, there never was a way. If the way was first, no grant of a fair could control it. At all events, the plaintiff ought to have shown in pleading which view of the case he took. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (June 24th,) delivered the judgment of the court.

To an action of trespass for seizing and taking away the plaintiff's booth, the defendant pleaded a by-law made for the suppression of nuisances by the mayor and corporation of Bury St. Edmund's, which we thought bad for reasons given on the argument: another plea, justifying the removal by alleging that the booth encumbered the highway, and which was worded as follows.

"Defendant saith that, long before and at the said time when, &c., there was, and of right ought to have been, a certain common and public queen's highway into, through, over and along the said close called the Angel Hill," "for all the liege subjects of our lady the queen to go, return, pass and repass on foot, and with horses and other cattle, and carriages, at all times of the year at their free will and pleasure; and that the said booth and the said goods and chattels in the said declaration mentioned, just before the said time when, &c., had been respectively wrongfully erected, put up and placed, and were, at the said time when, &c., respectively wrongfully standing, erected, being and remaining *in and across the said highway*, and stopping up and obstructing the same, so that, without removing the said *obstructions, and committing the said supposed trespasses, the liege subjects of our said lady the queen could not then pass and repass [*408 in and along the said highway as," &c.: wherefore defendant, "having occasion to use the said highway," in order to remove the said obstructions and to open the said highway, broke and entered the said booth and seized and took the said goods and chattels," took down the booth, carried away the materials, &c.

The replication to this plea stated that the locus in quo had been immemorially, and was, situate within the borough of Bury St. Edmunds, within which there was an immemorial fair holden for three weeks on the locus in quo, that is on certain parts thereof used for that purpose, but leaving, and so as to leave, open, unobstructed and unencumbered a sufficient part of the said close, and also of the said highway, for the queen's subjects, with their horses, carts and carriages, to go, return, pass and repass in and along the same as in the said plea mentioned. It then stated a custom for every victualler to enter upon any of the said parts of the locus in quo, but leaving as aforesaid, and, for the more conveniently carrying on their trade during the fair, to erect a booth and keep goods there till the fair was ended, paying to the owners of the soil a reasonable compensation for the use thereof. And he justified the obstruction of the highway under that custom.

There was a special demurrer: and the defendant objected that the replication was incongruous and inconsistent in admitting the right of road and stating it to be immemorial and to exist at all times of the year, and yet *409] claiming a right to obstruct it in certain parts "during the fair. The proper method of justifying under the custom was said to be by denying that the right of road existed at all times of the year over those parts which have been used for erection of booths and sale of goods.

It is material to observe the manner in which, from the above abstract, the public highway is claimed. It is stated to be a highway "into, through, over and along the said close called the Angel Hill," that is, over the said close and every part of it. And such claim, as is well known, may well exist in point of law; as, for instance, where a highway passes through an inclosed country, it is not the formed road merely, (whether of pavement, gravel or other material,) but the whole space from fence to fence is the highway; (a) and an obstruction in any part is equally the subject of an indictment. The extent of a highway, where it passes over a common, is frequently still more indefinite to the right and left of what may be the ordinary passage. In *Rex v. Lloyd*, 1 Campb. 260, a narrow court, diverging from Snow Hill and joining it again after a circuitous course, wholly useless to passengers along Snow Hill except at times of extraordinary crowd and pressure, but used at such times, was held by Lord ELLENBOROUGH (and on good grounds) to be a highway, and an obstruction to it indictable. In this case, as has been observed, the right to the highway is stated to be over the close, though the passage on ordinary occasions may have been through the middle or some other portion only: and the allegation that the said booth was erected and being "in and across the said highway" would be well *410] sustained by showing that the booth was in the said close called Angel Hill, without showing that it extended wholly from one side to the other, because it was wrongfully in and across the highway unless some lawful excuse for its being there be given; any interruption of the highway being otherwise unlawful. And the question is, in the first

(a) See *Rex v. Wright*, 3 B. & Ad. 681.

place, supposing the plaintiff to have an answer to the plea, in what manner it ought to be given, whether by a traverse of some allegation in the plea, or by introducing that answer as new matter in the replication. That he could not safely traverse the existence of a highway generally is sufficiently obvious. Nor, as we think, could he traverse the existence of a highway over the spot where the booth stood, because the precise part of the close over which sufficient passage for the public is (according to the alleged custom) to be left may vary on each occasion, and therefore the place where the booth may lawfully be placed may vary also, it not being any part of the custom, nor necessary for its validity, that the booth should be placed upon precisely the same part of the Angel Hill, or that the same portion of it should at each fair be left for passage. We are not aware that any other form of traverse was suggested.

We think, therefore, that the answer to the plea comes properly in the shape of a replication introducing the whole matter whereon it rests; and that raises the question whether that replication can be sustained, or, in other words, whether the custom therein stated be good in law.

And, upon this point, as the custom is stated to be immemorial, and is in itself reasonable, we are of opinion that it is. The present case bears no resemblance *to some which were referred to, where an obstruction to a public highway has been attempted to be justified by rea- [*411 son of some benefit of a private nature. The existence of a fair is treated in our law books as a matter of public convenience; and the reasons for so considering it are also entirely of a public nature. If, therefore, the custom disclosed in the replication may have had a legal origin, there seems to be nothing unreasonable in it, as abridging a public right without a countervailing benefit: such benefit may be well supposed to arise from the accommodation afforded to the persons frequenting the fair. Then, as to the custom: it may well be that the mayor, aldermen, and burgesses of Bury may have had the right of holding a fair (the right being claimed as immemorial) upon the locus in quo before the same became a highway; and, therefore, that the dedication thereof to the public may have been subject to a partial interruption during the continuance of the fair for a certain limited and not unreasonable time. It is not, therefore, a general and total obstruction of a public right, but a partial and limited one, both as to extent and duration, the public, during such limited obstruction, deriving, as has been already observed, a benefit which may well be considered as equivalent.

Upon the whole, we are of opinion that the replication is good, and that judgment should be for the plaintiff. Judgment for plaintiff.

Issues in fact having been joined in the cause, as well the above issues in law, the defendant, after delivery of judgment on the demurrer, gave notice of trial and assessment of damages. The plaintiff obtained [*412 a rule *to discontinue on payment of costs.(a) On taxation, the

plaintiff claimed, and was allowed, his costs of the demurrers ; which costs exceeded the defendant's costs upon the issues in fact. The plaintiff requested an allocatur for the balance ; but the defendant urged that he was not entitled to any costs, or, if he were, that they could not be set off against the defendant's. The master made his allocatur as follows.

	£	s.	d.
"For the defendant's costs of the cause - - -	26	8	0
For the plaintiff's costs of demurrers - - -	51	10	6

R. GOODRICH. 21st May, 1845."

Plaintiff then signed the usual judgment of discontinuance and entered it on the roll of the original proceedings, adding a suggestion, whereby, after reciting the allocatur as above, and that the plaintiff's costs exceeded those of the defendant by 25*l.* 2*s.* 6*d.*, execution was awarded to the plaintiff for such balance. A *fi. fa.* was afterwards issued for the same against the defendant's goods.

W. H. Watson, in Trinity term, (June 12th,) 1845, ^(a) moved for a rule to show cause why the taxation should not be reviewed, and the *fi. fa.* set aside. The plaintiff cannot recover these costs. *Mayor of Macclesfield v. Gee*, 13 M. & W. 470, appears to be an authority to the contrary ; but it is against principle that a party discontinuing his action should obtain costs of a judgment. [COLERIDGE, J. The form of the judgment of discontinuance shows that the suit is disposed of.] Till the plaintiff pays costs there is no discontinuance: the Court of Exchequer *does not *413] seem to have adverted to this in the case just cited. [COLERIDGE, J. Still it remains to be ascertained on what footing the costs are to be taxed.] The defendant ought not to be subjected to costs when the discontinuance deprives him of his writ of error. [PATTESON, J. The Court of Exchequer says that it does not.] The plaintiff has struck a balance of costs and taken out execution for the alleged surplus. This he could not do. The rule of court as to setting off costs ^(b) does not contemplate the case of a discontinuance. In *Mayor of Macclesfield v. Gee*, 13 M. & W. 470, the master made his allocatur for the balance ; and PARKE, B., held this wrong, because the defendant could not bring error upon a record framed on such a taxation. He said, indeed, that the costs might be separated, if it were insisted upon for the purpose of bringing error: but the course objected to, if wrong, is equally so whether error be brought or not. In *Cobbold v. Chilver*, 4 Man. & G. 62, the *fi. fa.* recited a judgment for 500*l.*, but commanded the sheriff to levy to 269*l.* 9*s.* 4*d.*, parcel of the debt ; and this was held irregular. [PATTESON, J. The execution was improperly issued for a balance. The plaintiff, here, according to the Court of Exchequer, was entitled to take execution for the whole, but you were entitled to your costs of the discontinuance. COLERIDGE, J. On a writ of error, if you succeeded, there would be a deduction of costs

(a) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

(b) R. Gen. Hil. 2 W. 4, L 74, 3 B & Ad. 385.

in your favour. In *Cobbold v. Chilver*, 4 Man. & G. 62, it is clear that the plaintiff should have taken the execution for the larger sum and endorsed to levy the smaller.]

Per Curiam,

Rule refused.

*BELCHER and Others, Assignees of CAREY, a Bankrupt, v. [*414
SAMBOURNE and BELL. *July 6.*

Defendant, being a creditor of C., struck a docket against him, and issued a fiat, but did not file it, (under stat. 2 & 3 W. 4, c. 114, s. 5,) nor otherwise proceed in the bankruptcy. Afterwards he was requested by C. to sign a composition deed, together with C.'s other creditors, accepting 10s. in the pound. He refused to do this, except on receiving security for his whole debt; which C. gave him by promissory notes; and defendant thereupon signed the deed.

C. afterwards committed an act of bankruptcy; and a fiat was prosecuted, under which plaintiffs were assignees. Before this act of bankruptcy defendant received money on one of the notes which had fallen due. Plaintiffs brought money had and received for the amount.

Held, that they could not recover; for that, although the case was within stat. 6 G. 4, c. 16, s. 8, and defendant's debt was forfeited, the money was to be paid only to persons appointed by commissioners under some commission founded on the defendant's docket, or under some later commission, and no appointment for this purpose had been made; and that, as C. himself could not recover the money, being a party to the transaction, the plaintiffs, who succeeded only to C.'s rights, could not.

ASSUMPSIT. The first count was for money had and received to the use of the bankrupt, laying the promise to him before the bankruptcy; the second, for money had and received to the use of the plaintiffs, as assignees, after the bankruptcy; the third, upon an account stated with the plaintiffs, as assignees. Plea, (with another not insisted upon by defendants:) Non assumpsit.

On the trial, before Lord DENMAN, C. J., at the London sittings after Trinity term, 1843, the following facts appeared. On 30th November, 1841, the defendants struck a docket against Carey, who owed them more than 300*l.*; upon which docket a fiat issued, in the country, on the 6th December following: this, however, was not shown to have been filed; and no further proceedings took place thereon. After the issuing of the fiat, in the course of the same December, defendants were pressed by the bankrupt to agree, together with his other creditors, to a composition of 10s. in the pound. This they refused to do, except upon condition of receiving securities for the other 10s., which the bankrupt *finally agreed to give [*415 them. Accordingly, promissory notes for the whole debt were given by the bankrupt to the defendants, dated 1st January, 1842. In the course of January defendants signed the composition deed. Early in February, 1842, Carey went to America: and upon this, as an act of bankruptcy, a docket was afterwards struck, and a fiat issued on 4th April, which was followed by the usual proceedings, and under which the plaintiffs were appointed assignees. One of the promissory notes, for 40*l.*, fell due and was paid by Carey before he left England: another, also for 40*l.*, fell due and was paid after Carey left England, but before the fiat, from Carey's

property, by his father, to whom Carey had assigned the property. The plaintiffs contended that, by the receipt of the promissory notes after the first docket was struck, the defendants forfeited this debt, under stat. 6 G. 4, c. 16, s. 8.(a) The defendants contended that the act of bankruptcy was not proved; that stat. 6 G. 4, c. 16, s. 8, was inapplicable, because the
 *416] bankruptcy under the first docket was not prosecuted; that at any rate a fiat ought to be shown to have issued on the docket; that the fiat here had not been recorded under stat. 2 & 3 W. 4, c. 114, s. 8.(b) and therefore could not be put in evidence; that, assuming stat. 6 G. 4, c. 16, s. 8, to be applicable to the facts, the assignees were not entitled to sue for the money in a court of law; and that at any rate the defendants were protected by stat. 2 & 3 Vict. c. 29, s. 1, or stat. 6 G. 4, c. 16, s. 82. The lord chief justice left to the jury the question whether Carey absented himself with intent to defeat or delay his creditors; and, they having found that he did so, his lordship directed a verdict to be entered for the plaintiffs for 80*l.*, reserving leave to the defendants to move on the points of law.

In Michaelmas term, 1843, *Erle* obtained a rule to show cause why the verdict should not be set aside, and a new trial be had, or the damages be reduced to 40*l.* In Easter term, 1844,(c)

Platt, E. James, and Lush, showed cause. It was not necessary, for the purpose of this action, to show that the first fiat had been filed. Stat. 6 G. 4, c. 16, s. 8, inflicts a forfeiture of the debt where a trader pays money or gives security to any person who has struck a docket against him: and this part of the enactment is not confined to the case where a commission issues,
 *417] "nor is it essential for this purpose that any fiat should issue at all. The object was to prevent fraud: the words are "a docket," not "the docket on which commission issues." [*PATTESON, J.* How do you reconcile that with the words "receive more in the pound in respect of his debts than the other creditors?"] That means, more than the others would

(a) Which enacts "That if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction or security shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the lord chancellor may either declare such commission to be valid, and direct the same to be preceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint for the benefit of the creditors of such bankrupt."

(b) Which enacts, "That no fiat issued or to be issued in lieu of a commission of bankruptcy, whether prosecuted in the court of bankruptcy or elsewhere, nor any adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the court of bankruptcy as aforesaid."

(c) April 22d. Before Lord Denman, C. J., *Patteson, Williams, and Wightman, Js.*

receive if a bankruptcy ensued. The docket was not to be taken out in *terrorem*. It is observable that stat. 5 G. 2, c. 30, s. 24, enacted that the debt should be forfeited if the money, &c., was given to the petitioning creditor "after issuing of any commission;" but in stat. 6 G. 4, c. 16, s. 8, the expression is altered to "after a docket struck." The earlier statute also uses the word "privately," showing that the object was to prevent a secret receipt of money to the injury of the other creditors. In *Davis v. Holding*, 1 M. & W. 159, S. C. Tyrwh. & G. 371, the Court of Exchequer decided that, independently of the statute, no action could be maintained on a bill of exchange given by defendant to the holder, after a fiat had issued against the defendant on the holder's petition, in consideration of the latter not further prosecuting the fiat. Afterwards this court, in another case between the same parties, *Davis v. Holding*, 11 A. & E. 710, held that an action might be maintained, for goods sold and delivered, by the holder of a bill given, under similar circumstances, to satisfy the debt owing for the goods, the proceedings in bankruptcy not having been prosecuted. But there it did not appear, as here it does, that a subsequent fiat had issued; and the judgment speaks of the case then before the court as being one "where no other creditors interfere." *Here the plaintiffs do represent other creditors. It will, perhaps, be argued that on the con- [*418] struction for which the plaintiffs contend, a creditor who has once struck a docket can never safely receive payment: but it was not intended that he should be protected in such a case, except by the Statute of Limitations. And, even if the production of the fiat was here essential to the plaintiffs' case, it was not necessary to show that it was filed. It is true that sect. 8 of stat. 2 & 3 W. 4, c. 114, enacts that the fiat shall not "be received in evidence," unless it has been entered of record in the Court of Bankruptcy. But that must be understood as applicable only to the case were it sought to give effect to the fiat: here the plaintiffs do not assert the validity of the first fiat. They seek to impugn the whole transaction. A forgery of a deed which required registration might be proved, though it was not registered. So unstamped documents may be given in evidence if they form part of an imputed fraud. Sect. 4 contemplates a commission; sect. 5 confers the power to enforce the recording only on parties "interested" in the fiat, which these plaintiffs are not. Sect. 8 speaks of fiats that are to be "prosecuted." [WIGHTMAN, J. "No fiat issued or to be issued." PATTESON, J. Before that statute, country fiats did not require recording; but sect. 4 includes them.] The notes were dated on 1st January, 1842; the first fiat was dated 6th December, 1841. Now this, being a country fiat, might, by the practice of the Court of Bankruptcy, be proceeded on within twenty-eight days; (a) that is, as late as the 3d January, *1842. The fiat, therefore, was still open when the notes were given, and might [*419]

(a) Archb. Bankr. B. 1, p. 103, (10th ed.); 2 Mont. & Ayr. Law and Practice of Bankruptcy, 329, (2d ed.) See now stat. 5 & 6 Vict. c. 122, s. 4.

have been filed the next day. It might, indeed, have been proceeded upon at any time by proper steps being taken: it never was finally abandoned. Further, as to the second 40*l.*: it was paid after the act of bankruptcy on which the second fiat was founded: and the payment, being made with notice (as the facts show) of the act of bankruptcy, was, if not a fraudulent preference, at any rate not protected by stat. 2 & 3 Vict. c. 29, s. 1, or stat. 6 G. 4, c. 16, s. 82, which last mentioned enactment, according to ALDERSON, B., in *Turquand v. Vanderplank*, 10 M. & W. 180, 194, is still in force as to payments.

Erle and Cowling, contra. The decision of this court in *Davis v. Holding*, 11 A. & E. 710, is directly in point for the defendants. The court there clearly construed sect. 8 of stat. 6 G. 4, c. 16, as applicable only to cases where there were creditors under proceedings in bankruptcy founded on the docket struck by the party receiving the money in question. The plaintiffs here represent parties claiming through the bankrupt himself, by virtue of a subsequent bankruptcy. They can stand in no better position than the bankrupt would have stood in before such subsequent bankruptcy. That sect. 8 applies only in favour of creditors under the fiat founded upon the particular docket, was decided in *Ex parte Smith*, 3 Mont. D. & De G. 144, which confirms the dictum of TINDAL, C. J., in *Rose v. Main*, 1 New Ca. 357, 360, S. C. 1 Scott, 127, 130, (most fully reported by Scott,) that [420] the securities contemplated are those given between the docket and a commission. The proof of a valid fiat was therefore essential to the case of the plaintiffs; and no such proof was given so as to satisfy stat. 2 & 3 W. 4, c. 114, s. 8. It is said that this clause applies only to bankruptcies which are to be prosecuted: but all dockets must be assumed to be struck with a view to prosecuting. The question might have arisen within the twenty-eight days: according to the argument on the other side, it would then have been impossible to say whether the section applied or not. Further, both payments are protected by stat. 2 & 3 Vict. c. 29, s. 1, being made before the fiat. That statute cannot be so construed as to exclude bona fide payments: the fiat now takes place of the act of bankruptcy: that view is in accordance with *Whitmore v. Robertson*, 8 M. & W. 463; *Ramsey v. Euton*, 10 M. & W. 22; and *Scry v. Carter*, 11 M. & W. 571. But, further, there was no notice of any act of bankruptcy, so as to deprive the defendants of the protection of stat. 6 G. 4, c. 16, s. 82. Again, assuming that sect. 8 of stat. 6 G. 4, c. 16, is applicable to this transaction, a court of law cannot enforce it. The lord chancellor might declare any commission issuing on that docket to be void, and issue a new one; and the money might be payable to persons appointed by the commissioners under either commission: but that does not give to the assignees under a subsequent act of bankruptcy a right of action for the money. Nor would such assignees have had any right of action under stat. 5 G. 2, c. 30, s. 24. By that clause, the commission was not void until superseded; *Garratt v.*

**Biddulph*, 4 Esp. 104: and it follows that the other provisions of the corresponding section, stat. 6 G. 4, c. 16, s. 8, require the authority of the Bankruptcy Court. The intention of sect. 8 was to give the chancellor a discretionary power over the bankruptcy, analogous to that which the common law courts possess over executions issuing by their authority; Henley on the Bankrupt Law, 431. *Cur. adv. vult.* [*421]

Lord DENMAN, C. J., now delivered the judgment of the court.

This was an action, for money had and received, by assignees of a bankrupt against two of his creditors, under the eighth section of stat. 6 G. 4, c. 16. The verdict was taken for 80*l.*, subject to a motion for a nonsuit or reduction of damages; and the question turned at last upon the right to recover in this action 40*l.* (a) paid under the following circumstances. (b)

In November, 1841, the bankrupt entered into a composition deed with creditors to pay 10*s.* in the pound. This deed the defendants refused to execute unless the bankrupt would give them notes securing 10*s.* in the pound in addition; which he did. They had previously struck a docket, and issued a fiat which was never prosecuted. The 40*l.* sued for was paid in respect of the notes, 28th December, 1841. At the end of January, 1842, Carey committed an act of bankruptcy, by absconding. *On this a fiat was issued, 4th April, by other creditors; and the plaintiffs [*422] were chosen assignees.

It would be difficult to contend that the transaction does not fall within the words of the section; for the bankrupt, "after a docket struck against him," did certainly "give," to the "persons who struck the same," securities, and afterwards paid the money secured, for their debt, whereby such persons might "receive more in the pound" in respect of their debt "than the other creditors." The section therefore is applicable in some way: and, to a certain extent, the defendants forfeited their whole debt, and became liable to repay the money "to such person or persons as the commissioners acting under such original commission," (i. e. a commission founded on this act of bankruptcy by the lord chancellor's direction,) "or any new commission," should "appoint."

This, however, is not the remedy sought to be enforced. The commissioner has not appointed any person to receive the amount. If he had done so, other questions might have been raised on the meaning of sect. 8. But the assignees rest their claim on the operation of the law, which, by virtue of that clause, invalidates the agreement, as was properly decided in *Rose v. Main*, 1 New Ca. 357, S. C. 1 Scott, 127. Now it was holden by this court, in *Davis v. Holding*, 11 A. & E. 710, that a creditor thus acting does not forfeit his debt as against his debtor: and the debtor who became party to the fraudulent agreement could not have recovered the money actually

(a) See p. 423, note (a), post.

(b) The statement of facts in the judgment will be found to differ from that in the preceding part of the report, as to some dates and other circumstances not affecting the principle of the decision.

*423] paid under it. He had no right to it at the time of his *bankruptcy; and the assignees who represent him could succeed to none.

We therefore think that the verdict must be reduced to 40*l*.(a)

Rule accordingly.

(a) It appears that the court considered the payment of the 40*l*. after the act of bankruptcy to be, under the particular circumstances of the case, taken out of the protection of stat. 6 G. 4, c. 16, s. 82, and 2 & 3 Vict. c. 29, s. 1, and therefore interfered with the verdict only to the extent of reducing the damages in respect of the money paid before the act of bankruptcy.

ELIZABETH WHITEHEAD v. HARRISON. July 6.

In a declaration in detinue, laying the property in the plaintiff, the common averment, that plaintiff delivered the chattel to defendant to be redelivered on request, is not material or traversable.

DETINUE. The declaration stated that plaintiff, on, &c., "delivered to the defendant a certain indenture of the plaintiff, that is to say a certain indenture bearing date," &c., (describing it,) of great value, &c., "to be redelivered by the defendant to the plaintiff when the defendant should be thereunto requested." Averment that defendant, though afterwards, to wit on, &c., requested, hath not as yet delivered, &c., and has detained and still unjustly detains, &c.

Second plea. "That the plaintiff did not deliver to the defendant such indenture as in the declaration mentioned, to be redelivered by the defendant to the plaintiff when the defendant should be thereunto requested, in manner and form," &c. Conclusion to the country.

Demurrer, assigning for causes that the plea traverses matter immaterial to the merits; that it seeks to put in issue a matter not properly issuable; *424] that the bailment alleged in the declaration is mere inducement, which is *not traversable; and that the plea is in other respects, &c.

The demurrer was argued last term.(a)

Joseph Addison for the plaintiff. The common bailment in detinue is no more traversable than the finding in trover. It does not bind to any proof. Detinue is an action founded on tort; had that not been so, the plaintiff in *Broadbent v. Ledward*, 11 A. & E. 209, must have been defeated on the objection of non-joinder. *Gledstane v. Hewitt*, 1 Cro. & J. 565, S. C. 1 Tyr. 445, where several authorities as to this form of action are referred to, was decided on the ground that, in detinue, the detainer is the gist of the action, and the bailment not material; and the authority of that case was recognised in *Walker v. Jones*, 2 Cro. & M. 672, S. C. 4 Tyr. 915. Some expressions of the court in *Mills v. Graham*, 1 New Rep. 140, may be cited as showing that the bailment may be traversed: but the point was

(a) June 7th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js. The defendant, being under terms of pleading issuable, pleaded the above plea, and that defendant was not requested to redeliver, modo et forma. The plaintiff signed judgment as for want of a plea; but the judgment was set aside on motion and argument in the bail court before Wightman, J., Mich. T., 1843. *Whitehead v. Harrison*, 1 Dowl. & L. 706.

not there judicially decided, as BAYLEY, B., observes in *Gledstane v. Hewitt*, 1 Cro. & J. 573, 1 Tyr. 455. And in *Mills v. Graham*, 1 New Rep. 140, if the court had considered the action as founded on contract, the defendant's minority would have defeated it on both counts. [PATTESON, J. Suppose the defendant pleaded only a denial of the plaintiff's possession, and the plaintiff relied upon his delivery to the defendant as an estoppel, could not he give evidence of the delivery?] *He might, in answer to the suggestion that the chattel was not his property. [PATTESON, J. [*425 Then could the defendant deny, by evidence, the delivery which he could not deny in pleading? The allegation of finding in detinue or trover is a mere creature of the pleading; but delivery may be the very foundation of the plaintiff's claim of property.] The finding is presumed to be a fiction, because the averment of it does not bind to any proof: but, if it happened to be material, the plaintiff might prove it; so he might the delivery. [PATTESON, J. In describing the thing detained, are the words "of the plaintiff" material?] They are. Without them it does not appear whose the property is: it may be the defendant's, or a third person's? [PATTESON, J. If it were a third person's, is not the defendant still bound, as between him and the plaintiff, by the delivery? COLERIDGE, J., mentioned *Armory v. Delamirie*, 1 Stra. 505.] Delivery of goods belonging to a third person would not bind the defendant to redeliver to the plaintiff. In *Jones v. Dowle*, 9 M. & W. 19, where detinue was brought against an auctioneer for a picture bought by the plaintiff, which the defendant had given over to the wrong person, the plea denied the plaintiff's right of property, not the delivery by him. The substantial averment in this action is that the property is the plaintiff's. [PATTESON, J. In declaring for use and occupation the practice used to be to leave out the words "of the plaintiff."] In an action of contract on an executed consideration they would be unnecessary.

John Henderson, contra. The defendant could not put in issue the plaintiff's title otherwise than by this *plea. In detinue on a finding, the only material allegation would be the plaintiff's ownership: a [*426 traverse of the finding would be an informal denial that the defendant had got the goods. But here the declaration is founded on a bailment to deliver on request: the words "of the plaintiff" are immaterial. They frequently do not occur in the old forms of the count on detinue, upon a bailment to redeliver; Rast. Ent. 211 b, tit. *Detinew de Chattels*, 2; 212 b, (same title,) 4; 212 b, 213 a, tit. *Enterpleder en Detinew*, 1; Brownl. Ent. 259, tit. *Debt*, (112;) 1 Brown's Ent. 147, tit. *Detinue*, (3;) 149, (same title,) 8; 2 Mod. Ent. tit. *Detinue*, [422,] a; (a) *Placita Generalia*, 370. And a denial of the ownership in such a case would raise a defence unjust in itself. If the defendant has received goods from the plaintiff, to be redelivered to him, he ought not to put the plaintiff to proof of his title. *Armory v. Delamirie*, 1 Stra. 505, shows that he could not set up a *jus tertii*. Nor, in fact, could the third party recover the goods by process against him. "If A. bail the

(a) Two precedents are there given, one alleging property in the plaintiff

goods of C. to B., and C. bring detinue against B. for them, B. may plead the bailment to him by A. to be redelivered to A., and so bring in A. as garnishee, to interplead with C.(a) And if A. bail goods to C., and after give his whole right in them to B., B. cannot maintain detinue for them against C., because the special property that C. acquires by the bailment, is not thereby transferred to B.;" per Holt, C. J., in *Rich v. Aldred*, 6 Mod. 216. The plaintiff's claim, therefore, resting upon the effect of the deli-

*427] very, which gives the defendant "a special property, as the plaintiff's bailee, and against all but him, a traverse of the delivery is the only proper mode of denying the right to recover. Non detinet would not answer the purpose. Before the new rules the allegation of bailment was not material for the purpose of pleading: but *Mills v. Graham*, 1 New Rep. 140, shows that the fact was material in evidence. The action of detinue is not founded on tort; for counts in debt and in detinue are constantly joined. There is no authority which proves that the present traverse is bad. In *Gledstane v. Hewitt*, 1 Cro. & J. 565, S. C. 1 Tyr. 445, the count alleged delivery of a note, to be redelivered on request. The plea stated that the note was delivered as a pledge for payment of 50*l.* which had not been paid. The replication, following the plea, alleged that the plaintiff offered payment of the 50*l.* and demanded the note. This was said to be a departure; but it was not, because, if the note was delivered, to be returned on a certain condition, and that had been performed, the defendant held the note to be redelivered on request. To raise the defence pleaded, he might at once have traversed the redelivery to deliver on request. So where goods have been sold on credit, the seller, after the credit is expired, may declare on an assumpsit to pay when requested. [PATTERSON, J. In *Mills v. Graham*, 1 New Rep. 140, Chambre, J., would not decide whether or not a special bailment might be traversed.] It was held in *Lane v. Tewson*, 12 A. & E. 116, note (a), that a lien might be proved under a plea in detinue denying the plaintiff's ownership; but the point now before the court was not raised. [COLERIDGE, J.

*428] As to the peculiar liability of the original bailee, it is said, in 1 Roll. Abr. 606, tit. *Detinue*, (C,) pl. 1, that, if a man deliver goods to L. to deliver to C., C. may have detinue, for the property is in him: and pl. 4, "if my bailee bail over to another, I may have detinue against the second bailee." Those placita are inconsistent with *Rich v. Aldred*, 6 Mod. 216. [Lord DENMAN, C. J., referred to 1 Roll. Abr. 606, tit. *Detinue*, (C,) pl. 9, 10.] In 2 Mod. Entr. [425,] where many authorities as to pleading in detinue are collected, it is said (pl. 7,) to be "no plea to say that the plaintiff gave" defendant "the goods, because he may wage his law, that the goods were not delivered to him to be redelivered:" for which Yearb. Mich. 22 Ed. 4, f. 29 B. pl. 10, is cited. [COLERIDGE, J. *Walker v. Jones*, 2 Cro. & M. 672, S. C. 4 Tyr. 915,(b) shows how *Gledstane v. Hewitt*, 1 Cro. & J. 565, S. C. 1 Tyr. 445, was understood by the

(a) See the form of pleading, 2 Mod. Ent. tit. *Detinue*, [422] b. Also, *ibid.* [425] b, 31.

(b) See the judgment of Lord Lyndhurst, C. B., in the latter report.

court which decided it.] *Walker v. Jones*, is very shortly reported: the declaration must have borne date before the new rules came into operation; and it was probably thought that the plea amounted to non detinet, which, until the new rules took effect, would have included a denial of the bailment.

Joseph Addison in reply. The substance of the complaint in detinue is that the defendant has, or has had, in his possession a chattel of the plaintiff which he ought to redeliver, and does not redeliver when demanded; *Jones v. Dowle*, 9 M. & W. 19. [PATTESON, J. Could you strike out the averment of delivery as immaterial, and leave a sufficient declaration?] It would be enough to allege that the goods, being the plaintiff's, came to the defendant's hands. [COLERIDGE, J. Suppose the plaintiff's only title, as between him and the defendant, is the bailment. If he must
[*429] allege property in the goods, and that is traversed, he cannot succeed; yet he ought to recover against the defendant.] BAYLEY, B., says, in *Gledstane v. Hewitt*, 1 Cro. & J. 570: "The nature of the action of detinue is, that the detainer is the gist of the action. The plaintiff must make out that he was entitled to the delivery of the article, and that the defendant wrongfully detained it; and if he can do that, he has done all that is necessary to maintain his action. He is not bound to show the circumstances under which the article came into the defendant's hands." That case was decided before the making of the new rules; but the law could not have been so stated even at that time if the circumstances of the bailment had been material. [PATTESON, J. Under the new rules, non detinet does not put in issue the rightfulness of the detention; the merits could not be tried on that issue.] The defendant might deny the property and conclude with a verification. [PATTESON, J. It appears by the authorities that the plaintiff is not obliged to allege property in himself. Suppose the words "of the plaintiff" are omitted.] If the defendant relies on the circumstances of the bailment, he must plead the facts specially. BAYLEY, B., in *Gledstane v. Hewitt*, 1 Cro. & J. 570, says: "If the declaration is to be considered as binding the plaintiff to a contract to redeliver on request, the defendant's plea should have concluded with a traverse; it should have stated that the note was delivered by way of pledge, and have traversed that it was delivered to be redelivered on request. That would have been essential, if the bailment in the declaration were material; but the
[*430] authorities show that such a traverse is not the common course of pleading; and the defendant must show such a delivery as will give him a continuing right to withhold the article." [PATTESON, J. Your argument throws it upon the defendant to disprove the plaintiff's right; but he ought to have some means of pleading so as to throw the onus of proof on the plaintiff. Lord DENMAN, C. J. Was not a case bearing upon this point decided lately in the Exchequer?] *Mason v. Farnell*, 12 M. & W. 674, S. C. 13 Law J. N. S. (Exchequer) 142, is probably the case referred to. [Lord DENMAN, C. J.,

read the latter part of the judgment in that case, including the quotations from Co. Litt. 283 a, and *Isack v. Clarke*, 1 Roll. Rep. 126, 128.](a) In the old entries there are several instances in which the defendant pleads special matter, showing that he is not bound to redeliver, with a formal traverse of the bailment in manner and form as alleged by the plaintiff. Rast. Entr. 212 a, tit. *Detinue de Chattels*, 3; 1 Brown's Entr. 149, tit. *Detinue*, (8;); 2 Mod. Entr. [423.] In *Philips v. Robinson*, 4 Bing. 106, the Court of Common Pleas approved of the doctrine that a party who was entitled to a chattel and handed it to a bailee, but whose title is since gone, cannot sue the bailee in detinue by reason of the original privity between them, but the owner for the time being should bring the action. [Lord DENMAN, C. J. There are two forms of declaration in detinue; one alleging a delivery by the plaintiff to the defendant; the other a finding by the defendant. In the first no right of property in the plaintiff is set up; in the other it is. *The distinction does not seem to have been contemplated in framing the new rules. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

This was an action of detinue. The declaration stated that the plaintiff delivered an indenture of him the plaintiff to the defendant, to be redelivered on request, and then stated the detainer after request. The plea traversed the bailment as alleged. To this there was a demurrer.

Doubtless, before the new rules, the common bailment was not traversable, as was decided by the Court of Exchequer, in the cases of *Gledstane v. Hewitt*, 1 Cro. & J. 565, S. C. 1 Tyr. 445, and *Walker v. Jones*, 2 Cro. & M. 672, S. C. 4 Tyr. 915. The only question is, whether the new rule which has confined the plea of non detinet to a simple denial of the detainer makes any difference. That such is the effect of the new rule, see the rule itself, (b) and *Jones v. Dowle*, 9 M. & W. 19.

It was argued for the defendant that he could not traverse the property of the plaintiff, because the words "of the plaintiff" are immaterial, and are not to be found in the old entries in Rastell and other books: and that, as the case of the plaintiff might really consist of some attempt to prove an actual contract of bailment, there is now no way to put him upon proof of his case unless this traverse be allowed: then it seems most unjust *432] *to compel the defendant to plead specially and take the onus of proof on himself, instead of being able in this as in all other cases to put the plaintiff upon proof of his right.

On the other hand, the plaintiff relies on the authorities which show that he is at liberty, notwithstanding the averment of bailment, to show any other mode by which the goods came into the hands of the defendant; and consequently that the bailment is not traversable. The recent case in the Court of Exchequer, of *Mason v. Farnell*, reported in the Law Journal for

(a) Dicta of Houghton and Doderidge, Ja.

(b) Reg. Gen. Hil. 4 W. 4, Pleadings in particular actions, III, 5 B. & Ad. ix.

the month of May, 1844, page 142,(a) favours this view of the case; and, however hard it may appear upon the defendant, we feel ourselves bound by the authorities to hold that the plea traversing the common bailment is bad.

It should seem that some alteration is requisite in the declaration, and that the plaintiff should be bound to state truly how the goods came into the hands of the defendant; and then his statement would be traversable: but, until such alteration be made by the proper authority, we must abide by the decided cases. Judgment must be for the plaintiff.

Judgment for plaintiff.

(a) S. C. 12 M. & W. 874.

*The QUEEN v. The Mayor, Aldermen and Burgesses of [432
STAMFORD. July 6.

A resolution, on the reappointment of a town clerk by a corporation after stat. 5 & 6 W. 4, c. 76, to increase his salary in compensation for the loss of former emoluments, is not valid unless executed under seal.

Such reappointment cannot, therefore, be proved by an entry of it in the minutes of the town council.

After a mandamus has been granted, return made, and an issue thereon tried, the court will not quash the mandamus on grounds which were or might have been discussed on showing cause against the application for it; as, that a suggestion on which the motion was made is untrue.

A mandamus for compensation, under stat. 5 & 6 W. 4, c. 76, s. 68, was moved for on the ground that the prosecutor had by the passing of the act lost the emoluments of an office, and that, although he had since been reappointed to another office at an increased salary, there had been no agreement between the prosecutor and the corporation that such increase should be deemed a compensation for the loss. On return, and trial of an issue bringing this fact into question, the judge and jury declared themselves of opinion that such an agreement had existed. *Held*, no ground for quashing the mandamus.

The mandamus required the corporation, by its corporate style, to assess compensation, (instead of requiring the council to assess compensation, and the corporation to execute a bond.) After return, and issue in fact tried,

Held, that, assuming the writ to be materially defective in form, the court ought not to quash it on motion.

WADDINGTON, in Michaelmas term, 1842, obtained a rule calling upon the mayor, aldermen and burgesses of the borough of Stamford, in Lincolnshire, to show cause why a mandamus should not issue, commanding them to assess the amount of compensation to be paid to James Torkington, gentleman, for the loss of the salary, fees, emoluments, &c., of the office of clerk to the justices of the said borough. The motion was made on the affidavit of Mr. Torkington, stating that, before and until the passing of stat. 5 & 6 W. 4, c. 76, he held the offices of town clerk and clerk of the peace, and the office of clerk to the justices in conjunction with that of town clerk: that he was reappointed town clerk after the statute passed; but the statute, sect. 102, then rendered it illegal for him to be reappointed clerk to the justices. That, in August, 1840, he delivered to the treasurer of the borough (he himself being the town clerk) an account of emoluments, &c.,

*434] of the office of clerk to the justices, in respect of which he claimed *compensation; that such claim was taken into consideration at a meeting of the town council, January 19th, 1841, and by them rejected: and that he appealed to the lords of the treasury, but they declined interfering, being advised that they had not jurisdiction where compensation was wholly refused, but only where there was a dispute on the amount awarded. That "it has been suggested by the town council of the said borough, as a reason for rejecting his said claim, that he has already received compensation for the loss of his office by an increase of his salary as town clerk; but deponent denies that there was any agreement, direct or indirect, express or implied, between himself and the town council, or any understanding on his part, that such increase of his salary as town clerk was to be deemed a compensation for the loss of his said office of clerk to the justices, or for any part thereof, or that the acceptance of the said increased salary was in any way to preclude him from applying for such compensation." That the increased salary was no more than a sufficient remuneration for the duties to be performed by the town clerk after the passing of the act, without taking into consideration the loss of former emoluments; and that such increased salary was accepted by the deponent, and, as he believed, proposed by the council, as a remuneration for his future services, and without reference to any other consideration.

Affidavits were made in answer, stating that, at the time of Torkington's reappointment, no agreement was made respecting his salary as town clerk and clerk of the peace; but that, shortly afterwards, the subject was discussed at a meeting of the town council, and his salary as town clerk and *435] clerk of the peace, which had *been only 4*l.* a year, was raised to 100*l.* at his own suggestion; which "was expressly agreed to by the town council in consequence of the loss Mr. Torkington had sustained in being deprived of his office of clerk to the justices, and other profits under the corporation," which he had enjoyed before the passing of the statute. The rule for a mandamus was made absolute.

The writ issued, directed to the mayor, aldermen and burgesses, and reciting, among other things, that Torkington made his claim to the town council, who disallowed it, and that he, "being dissatisfied with such determination of the council of the said borough, did require you, the said mayor, aldermen and burgesses of the said borough, to reconsider your determination, and to assess to him an adequate compensation for the loss of his said office of clerk to the justices," and to secure to him such compensation by bond under the common seal of the borough, &c.; but that the mayor, &c., refused to assess compensation and execute such bond. The writ, therefore, commanded the mayor, aldermen and burgesses to assess the compensation, &c., and secure the amount by a bond, &c.

The return stated that, before 1st January, 1836, the prosecutor's salary as town clerk and clerk of the peace was 4*l.* per annum; "but that, upon the 4th day of October, A. D. 1836, it was agreed between and by us, the mayor,

aldermen and burgesses of the borough of Stamford, and the said James Torkington, that the salary of him the said J. T. as town clerk and clerk of the peace should be raised from the said sum of 4*l.* per annum, up to 100*l.* per annum, to commence retrospectively from the 1st day of January, A. D. 1836; which *increase of salary was so agreed upon, and the said J. T. then expressly accepted the same, as an absolute pecu- [436
niary compensation for his aforesaid loss of his said office of clerk to the justices, and for all other losses which he had incurred or might incur by the operation of the statute." That the prosecutor had been paid the said salary of 100*l.* from 1st January, 1836, to the present time, and never made, or intimated the intention of making, any further claim, till August, 1840, when he preferred a claim to the mayor, aldermen and burgesses, for compensation for the loss of his said office: and that they, on 19th January, 1841, took the claim into consideration, and rejected it, because, on 4th October, it had been agreed, &c." (as before stated in the return.)

The prosecutor traversed the return, alleging that the said increase of salary was not agreed upon, nor did he expressly accept the same, as an absolute pecuniary compensation for his aforesaid loss, &c., and for all other, &c., in manner and form, &c. Issue was joined on this traverse.

On the trial, before Lord ABINGER, C. B., at the Lincoln Summer assizes, 1843, the defendants began, and called witnesses, who stated the re-election of Mr. Torkington as town clerk and clerk of the peace after the passing of stat. 5 & 6 W. 4, c. 76: that the amount of his future salary was then discussed between him and the town council, and fixed at 100*l.* a year; that he, on that occasion, required that his loss of the clerkship to the justices should be considered in the amount of salary to be allowed, and it was considered accordingly; and that Torkington received the salary during five years, without making any further claim. Minutes of the council were then read, containing a *resolution (a) that a salary of 100*l.* per annum [437
should be allowed; but no agreement, or other document under seal, was produced. The lord chief baron left it to the jury to say, whether, at the time of the discussion with the town council, Torkington included in his estimate the loss of his employment as clerk to the justices, and whether there was a parol agreement between him and the corporation that 100*l.* a year should cover all his losses: but his lordship gave leave to move to enter a verdict for the crown, if this court should be of opinion that the corporation could not be bound by such an agreement unless it were under seal; or that the agreement stated in the return was not made out by sufficient legal evidence. The jury stated their unanimous opinion to be, that there was an agreement to the effect before mentioned; and the learned judge said he had no doubt that there was such an agreement, though it had not been put into form. Verdict for defendants.

(a) The form was as follows. "4th October, 1836. Adjourned quarterly meeting. Proposed by Mr. Weldon, and seconded by Mr. Rowe, that Mr. Torkington be allowed a salary of 100*l.* per annum for general business, agreeable to the following particulars," (which were then set forth)

Humfrey, in the ensuing term, moved, according to leave reserved, for a rule to show cause why a verdict should not be entered for the crown, unless the facts should in the meantime be stated in a special case for the opinion of the court.

Hill, in the same term, moved for a rule to show cause why the mandamus should not be quashed, on the ground that, in moving for the writ, the prosecutor *had relied upon affidavits stating that he had never received compensation for the office of clerk to the justices, and, there *438] being a conflict of depositions on this point, the court had granted a mandamus; but it now appeared by the special finding of the jury, in which the judge concurred, that he had, by agreement, received such compensation, and therefore the supposed ground of application did not exist. Rules nisi were granted; and in last Easter vacation (a) cause was shown against each rule.

Hill, *Whitehurst*, and *A. J. Stephens* for the defendants. As to the seal. If any thing was incomplete in the formation of the agreement, the prosecutor must be taken to have waived it; for he was the legal adviser of the corporation, and ought to have enforced the observance of all necessary forms for his own benefit. Both parties showed their adoption of the contract by acting on it; and the corporation, having so acted, is bound; *De Grave v. Mayor, &c. of Monmouth*, 4 Car. & P. 111. A corporation may hire a servant without an agreement under seal; if so, they may continue him in like manner. A corporation may transact its internal affairs without execution of instruments under seal; 1 Kyd on Corporations, 449, 450; *Rex v. Chalke*, 1 Ld. Ray. 225; *Rex v. Mayor of Rippon*, 1 Ld. Ray. 563. They may contract by parol for letting a market; 6 Vin. Abr. 292, tit. *Corporations* (K), pl. 41. "The agreement of the major part of a corporation being entered in the corporation books, though not *under *439] the corporate seal, will be decreed in equity; *Maxwell v. Dulwich College*, 1 Fonbl. on Equity, 306, note (o), 5th ed.;" *Marshall v. Corporation of Queenborough*, 1 Sim. & Stu. 520 (b). Here, if the parol agreement was in itself obligatory on the corporation, it cannot be argued that the contract did not bind the prosecutor for want of mutuality; but, assuming that the agreement was informal, still, if the corporation have so acted upon it as to be bound by way of estoppel, that answers the objection as to mutuality, according to the judgment of the Court of Common Pleas in *The Fishmongers' Company v. Robertson*, 5 Man. & G. 131, 191—196. [PATTESON, J. The corporation could not act upon the agreement, nor be proper parties to it, though the return is framed as if they were. Under stat. 5 & 6 W. 4, c. 76, s. 66, the council agree upon and assess the compensation for loss of an office, and then it is secured by the bond of the corporation.] The

(a) May 9th. Before Lord Denman, C. J., Patteson and Williams, Js. Coleridge, J., was in court during the latter part only of the argument.

(b) The opinion is there given on the supposition that expense has been incurred on the faith of a resolution to grant part of the corporation property.

adoption of the agreement makes it their act. They pay the salary. [PATTESON, J. They had no right to pay it. If they so acted on the agreement, their acting was void.] The salary comes out of the corporation funds. [PATTESON, J. It comes out of the borough fund; the corporation could not be sued for it; *Jones v. Mayor of Carmarthen*, 8 M. & W. 605; though the bond, by the express direction of sect. 67, is given under the corporation seal. If the salary here was a compensation, it ought to have been determined upon by the council.] Further, the traverse of the return does not, by its terms, deny that an agreement was made, but only avers that the prosecutor did not thereby *accept an increase of salary as compensation for the loss of his clerkship to the justices. [*440]

(They contended also that the minute of council, with the other evidence, sufficiently proved the agreement relied upon by the defendants, and that evidence beyond the minute itself was admissible, as showing the consideration on which the salary was granted. But on these points no decision was given: the argument, therefore, is not further stated.)

Humfrey and Waddington, contra. The return is altogether erroneous, for the reason already pointed out. [PATTESON, J. The mandamus is wrong too. It states that the prosecutor, being dissatisfied with the order of the town council, requested the corporation to reconsider it; and the mandamus is directed to the corporation.] The corporation has made a return to the mandamus so framed. (The court then directed them to show cause against the rule for quashing the mandamus.) If the motion to enter a verdict for the crown is substantially right, the rule to quash the writ will, of course, not be made absolute. The mandamus is rightly directed; the practice, in cases of this kind, is to call upon the corporation. [PATTESON, J. Only to execute and deliver a bond.] In *Regina v. The Corporation of Warwick*, 10 A. & E. 386, the mandamus was to assess compensation. As to the finding at the trial, the court will not quash a mandamus on a mere allegation of facts: the facts, too, being only such as were or might have been shown to the court as cause for not granting the writ. The defendants ought to have stated on their return the proceedings of the town council; then the prosecutor *would have been prepared with evidence in answer, which he was not, concluding that the minute of the council could not be relied on as showing an agreement. [PATTESON, J. I think the mandamus ought to have gone to the town council; then, probably, the point would have been tried.] As it is, a specific issue has been taken and tried. [Lord DENMAN, C. J. At present we must take the mandamus to be right. When a peremptory mandamus is moved for, we may inquire into this point. According to the old law, when part of a corporation was bound to do a thing, the mandamus went to the corporation.] [*441]

Whitehurst and A. J. Stevens, as to the motion to quash. It is shown, by the decision of a jury, that an agreement existed, such, at least, as a court of equity would carry into effect. Had this court been satisfied that such was the case when the rule for a mandamus was under discussion, a man-

damus would not have been granted ; for it rests in the discretion of the court to direct that a mandamus may issue, or to forbear ordering it, as they may deem best for the advancement of justice ; *Rex v. The Paddington Vestry*, 9 B. & C. 456, and the cases there cited.

Lord DENMAN, C. J. This application is made on the ground that the prosecutor deceived the court when the mandamus was obtained. I think we have no right to quash the writ on that ground. No case is cited in which the court has quashed a mandamus on grounds which might have been shown against making the rule for a mandamus absolute.

*442] *PATTESON and WILLIAMS, Js., concurred.

Rule for quashing the mandamus discharged.

On the other point,

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the court.

This was a mandamus to give compensation (which the defendants had disallowed on considering the claim) to the late clerk to the justices of the peace of the borough of Stamford, from which office he had been removed without misconduct. The return bore that he had already received compensation ; particularly setting forth that it was agreed, in October, 1836, between the prosecutor and the defendants, that his salary in respect to the offices of town clerk and clerk of the peace should be raised from 4*l.* to 100*l.*, commencing from the preceding 1st January ; and that the prosecutor expressly accepted the same as a pecuniary compensation for his aforesaid loss of his said office of clerk to the justices of the peace, and for all other losses which he had incurred or might incur by the operation of the statute 5 & 6 W. 4, c. 76. ; with an averment that the increased salary had been regularly paid, and the prosecutor never intimated a wish for any further compensation till August, 1840. The prosecutor traversed the return, alleging that the said increase of salary "was not agreed upon, nor did he expressly accept the same, as an absolute pecuniary compensation, &c."

On the trial, before Lord ABINGER at Lincoln, it was proved that, at a corporate meeting, the agreement set forth was verbally made : and the sole question was, whether such agreement could by law be so made.

*443] *On the authority of several cases, particularly that of *Arnold v. The Mayor of Poole*, 4 Man. & G. 860, we are of opinion that it could not : that the agreement could not bind without being sealed ; and that the question as to a valid and binding agreement having been entered into was raised by the issue ; consequently that the verdict, according to leave reserved, must be entered for the crown.

Rule absolute to enter verdict for the crown.

HARRIOT DAVIES v. GEORGE CROFT VERNON and LUKE MINSHALL. July 6.

By marriage settlement, lands were settled on the husband for life, with a joint power of appointment in the husband and wife. They mortgaged the land, with all title deeds, to A. for a term, and delivered the deeds to him. M. D. paid off the mortgage; and took an assignment of the premises from A., the first mortgagee, but without mention of title deeds, and M. D. never demanded them. A. afterwards gave up the deeds to the husband; and he deposited them with the defendants, solicitors, as collateral security for mortgage money which he owed their client. Afterwards, the husband and wife mortgaged the settled lands in fee, subject to the term, without mention of title deeds; and they executed the power of appointment by giving a like power to the wife alone. The husband died; and the wife appointed to herself in fee. She then offered defendants to pay the debt due from her late husband to their client, on receiving back the title deeds, denying, however, that she was liable for such payment; but the defendants refused to deliver them unless they were paid also their own charges for business done for their client in respect of the mortgage to him.

In trover by the wife against defendants for the deeds, *Held*,

1. That the delivery of the deeds by A. to the husband was a rightful delivery, and enured to the benefit of the husband and wife during their joint lives, and afterwards of the wife as appointee under the power.
2. That the wife was entitled to hold the deeds as against the mortgagee in fee, having an interest in them in respect of her equity of redemption, no mention being made of them in the conveyance in fee, and the deeds never having been handed over to the mortgagee in fee.
3. That, even if this were not so, the defendants could not set up the right of the mortgagee in fee.
4. That the action well lay against the defendants, though they held the deeds only as solicitors.
5. That the demand, accompanied by an offer to pay, was sufficient, though plaintiff at the same time denied her liability.
6. That the refusal to give up the deeds except on condition, which defendants had no right to impose, that their charges in respect of business done for their own client should be paid, was evidence of a conversion.

TROVER for deeds and writings, to wit an attested copy of release, &c., a certain exemplification of a recovery, &c., (the declaration described the several instruments *by the dates and parties.) Pleas. 1. Not guilty. 2. Plaintiff not possessed. Issues thereon. [*444]

On the trial, before WIGHTMAN, J., at the Worcester Spring assizes, 1843, a verdict was taken for the plaintiff with 1000*l.* damages, to be reduced to 40*s.* if the defendants should give up the deeds; and with leave to the defendants to move to enter a nonsuit. *W. J. Alexander*, in Easter term, 1843, obtained a rule to show cause why a nonsuit should not be entered or a new trial had.

In Hilary vacation, 1844,(a) *R. V. Richards* and *F. V. Lee* showed cause, and *W. J. Alexander* and *J. W. Smith* supported the rule. The facts of the case, the points argued, and the authorities cited, will appear sufficiently from the judgment of the court and the notes subjoined.

Lord DENMAN, C. J., now delivered the judgment of the court.

This was an action of trover for the recovery of the title deeds of an estate. The pleas were: 1. Not guilty. 2. That plaintiff was not possessed. The facts at the trial appeared to be as follows.

In August, 1810, a deed of settlement was executed upon the marriage

(a) February 9th. Before Lord Denman, C. J., Patteson and Wightman JJ

of the plaintiff with her husband, since deceased. By the settlement, the estate in question, with others, was settled on the husband for life, with a joint power of appointment in the husband and wife. On the 8th April, 1830, the husband and wife mortgaged the estate to one Allen for one thousand years to secure 700*l.*; and in that mortgage mention is made of *445] the title *deeds in question; (a) and they were delivered over to Allen. In November, 1830, Allen assigned the term to Mary Davies, daughter of the plaintiff. (b) In that assignment no mention is made of the title deeds. In September, 1832, Mary Davies assigned the term to John Jobson the elder: no mention is made of the assignment of the title deeds. The deeds were given up by Allen to the husband (Davies) some time in 1831, and were by him deposited in that year with the defendants, the solicitors of a Mr. Edward Vernon, as a collateral security for money charged on an estate of his own. By lease and release of 6th and 7th March, 1833, (c) the premises were mortgaged in fee to Thomas Jobson. No mention of the title deeds is made in that conveyance.

In 1834 the husband wished to borrow more money: and the plaintiff at first assented, but afterwards refused to execute any further deed. In 1838 the power contained in the settlement was executed by the husband and wife giving a power of appointment to the survivor. In 1842 the husband died; and the plaintiff *appointed to herself in fee. A demand was after- *446] wards made by the plaintiff upon the defendants for the deeds.

The plaintiff had a verdict, leave being reserved to enter a nonsuit. A rule nisi having been obtained, three questions were raised on the argument.

1. Whether the plaintiff is shown to be entitled to the possession of the deeds.
2. Whether the defendants are the proper parties to the action, or it should have been brought against their principal, Edward Vernon.
3. Whether there was sufficient evidence of a conversion.

With respect to the first question, the mortgage for one thousand years in 1830, was a good execution of the power contained in the marriage settlement; and, as the deeds in question are mentioned in that mortgage, and even delivered to Allen the mortgagee, he certainly was entitled to hold them against both the husband and wife. It appears, however, that, when Allen assigned the term to Mary Davies, he did not, in that assignment, mention, or give up to her, these deeds; and, if he had had any interest in the estate independent of that mortgage term, he might legally have with-

(a) They appointed, and also granted, bargained, sold and confirmed to Allen, his executors, &c., a message or tenement, and several parcels of land, called, &c., together with all houses, outhouses, &c., to the said hereditaments belonging, &c., and the reversion, &c., and all such deeds, writings and muniments of title whatsoever, relating to or in anywise concerning the same message, &c., as are now in the custody, possession or power of the said Edward Davies and Harriot his wife, or either of them, and they, he or she can or may procure without suit at law or in equity. To hold, &c.

(b) Mary Davies having paid off Allen's mortgage. Edward Davies and his wife were parties to the assignment, and appointed &c. to Mary Davies. And they joined in like manner in the next mentioned deed of September, 1832.

(c) Between E. Davies and his wife of the first part, John Jobson of the second part, and Thomas Jobson of the third part; subject to the term.

holden them from Mary Davies, according to the case of *Yea v. Field*, 2 T. R. 708.(a) But Allen had no such interest, and would therefore have been bound to give up the deeds to Mary Davies, and she to John Jobson the elder, upon assigning the term to him, if they had been required. It does not appear that they were required; and in point of fact they were given up to Davies the husband. It is said that this *was not a giving them up to the husband and wife, but to the husband only: [*447 out we are of opinion that, as the husband and wife were the mortgagors, being joint appointors of the term, and as the husband was tenant for life of the estate, the giving up the deeds to him accrued to the benefit both of himself and his wife, and that he was entitled to hold them for his life, and that on his death they would belong to the person to whom he and his wife should have appointed the fee under the power. That would, in this case, be to the plaintiff herself, by virtue of their joint appointment in 1838, and of her appointment after his death in 1842, unless Thomas Jobson be entitled to them under the lease and release of March, 1833.

Now that conveyance in 1833 is silent as to the deeds; and, though it be a mortgage in fee, yet, if the deeds remained with the mortgagors, they might lawfully retain them in respect of their equity of redemption as against the mortgagee. At any rate, a stranger cannot set up the right of the mortgagee who has never asserted it himself, and whose mortgage contains no mention of the deeds.(b)

Further, it appears that the deeds were deposited with the defendants by the husband, who was then tenant for life; they had therefore good right to hold them during his life, and during his life only, and were then bound to give them up to the person lawfully entitled.(c) We have shown that the plaintiff is that person, *as against John Jobson the assignee of the term, and as against Thomas Jobson the mortgagee in fee, because [*448 neither of them had any covenant entitling him to the possession; much less can any mere strangers, as the defendants now are, set up any supposed claim of either of the Jobsons.

The second question is whether the defendants are the proper parties to this action. The general rule is, that an agent is liable in trover for a conversion to which he is a party, though it be for the benefit of his principal; *Perkins v. Smith*, 1 Wils. 328. The case of *Stephens v. Badcock*, 3 B. & Ad. 354,(d) which was cited, does not at all apply. That was an action for money had and received, and required a privity between the parties, which is quite unnecessary in an action of trover. Neither does the case of *Mires*

(a) To this point were also cited *Wiseman v. Westland*, 1 Y. & J. 117, 2 Sugl. Vend. & Purch. 105, c. ix., s. iv., 42, 43, 10th ed., 2 Prest. Conveyancing, 466, 2d ed., 2 Pow. Mortg. 642, c. xiv., note (T).

(b) As to setting up *jus tertii*, *Leake v. Loveday*, 4 Man. & G. 972, was cited for the defendants.

(c) On this part of the case *Owen v. Knight*, 4 New Ca. 54, and *Phillips v. Robinson*, 4 Bing. 106, were cited in support of the rule.

(d) See *Bamford v. Shuttleworth*, 11 A. & E. 926.

v. *Solebay*, 2 Mod. 242,(a) govern the present: for there the defendant was a servant only, and, when the demand was made upon him, was not in possession of the sheep demanded: and, again, there was a special verdict which did not find the conversion, but only the demand and refusal, which was held to be evidence only. Here the defendants originally received the deeds in question, and were in possession of them at the time of the demand. The case of *Cranch v. White*, 1 New Ca. 414, is much more in point, and is an authority to show that this action will lie against the defendants.

*449] The last question is, whether there be sufficient evidence *of a conversion. Now the defendants, by their letter, refuse to deliver up the deeds unless upon a certain condition, which they had no
*450] right to impose: (b) *that is tantamount to an absolute refusal. And

(a) *Lane v. Cotton*, 12 Mod. 472, 488, was also cited for the defendants, as showing that a person acting only as agent was not liable for a mere non-feasance.

(b) The following, among other letters, were proved at the trial.

From Messrs. Jones & Co., plaintiff's solicitors in the country, to defendants, October 19th, 1842.

"Mrs. Davies has instructed us to raise money by mortgage of a certain portion of her estates, a sum sufficient to discharge the existing mortgages upon all parts of her property, and procure reconveyances thereof, and obtain possession of all her title deeds. That done, she gives us to understand that it is her intention, by sale of a part of the Penthryn estate, to discharge the debts of her late husband, or such portion thereof as upon examination will appear to her to be fair and just. Amongst the claims which she has instructed us to discharge at once out of the mortgage, is intended that of your client, Mr. Vernon; and we are now prepared to pay it, on receiving from you all the deeds and documents affecting her estate, in your or his custody. With respect to your claim upon the late Mr. Davies, she informs us that she never saw any particulars of it, and hath requested us to ask you to send us a full statement thereof for her examination. Yours," &c.

From defendants to plaintiff's solicitors in the country, October 21st, 1842.

"Before we part with any deeds in our possession, the whole demand upon them must be paid. This will, of course, comprise not only Mr. Vernon's mortgage, but our and Mr. Minshall's claim. You have had a statement of both of these." (This statement comprised the professional charges of defendants for business done on behalf of Mr. Vernon in respect of the mortgage; and also a cash account stated in Davies's lifetime between him and Minshall individually.) "Mr. Jones, when at Bromsgrove, saw a statement of account signed by Mr. Davies, and he also saw the draft mortgage from Mr. Davies to Mr. Minshall, approved and signed by Mr. Davies before it was engrossed. This mortgage, with the subsequent interest upon it, and the payment made by Mr. Minshall to Mr. Smith, of the Golden Cross Hotel, in this town, and the interest upon that payment, will form, as appears by the account sent you, our demand."

* * * * "We shall be ready at any time to deliver up all deeds and documents in our possession, on payment of what is due to Mr. Vernon on his mortgage, and to ourselves or to Mr. Minshall. Yours," &c.

From plaintiff's solicitors in London, to defendants, November 30th, 1842.

"We have received instructions from Mrs. Harriot Davies, now in London, to pay, (without prejudice to her rights, and without admitting any obligation on her part to do so,) the residue of principal and interest due to your client Mr. Edward Vernon, upon having delivered up to us the deeds and documents belonging to her, and enumerated in the two receipts given by you to the late Mr. Davies, in 1831, (except such of them as you have since given up.) We beg to request the favour of an explicit answer, whether you are prepared to deliver up the deeds upon such payment, or still insist upon holding them upon any further alleged lien, as, in default of the deeds being given up, we are instructed at once to commence proceedings against you, for Mrs. Davies is in want of her deeds. Yours," &c.

From defendants to plaintiff's solicitors in London, December 23d, 1842, after some intermediate letters of no importance here.

"We shall certainly object to any deeds being delivered up on the terms contained in your letter. Our agent, Mr. Benbow, will appear to any writ which Mrs. Davies may issue against us. Yours," &c.

this is not like the case of *Alexander v. Southey*, 5 B. & Ald. 247 ; (a) for there the defendant, being a servant only, said that he could not deliver up the goods without the order of his masters ; and it was held not to be a conversion. But here the defendants are not mere servants : they are the professional agents of Mr. Edward Vernon, the persons who originally received the deeds ; and they do not in their refusal put it on the ground that they must act *under the orders of their principal, but, being in possession of the deeds, attempt to annex a condition to the [*451 delivery of them which they had no right to annex. (b)

Upon the whole, therefore, we are of opinion that the plaintiff was entitled to recover as against these defendants, and that the rule which has been obtained must be discharged.

Rule discharged.

(a) It was argued, for the defendants, that the demand of the deeds was not sufficient to maintain this action, because the offer to pay, which accompanied the demand, was qualified, (see letters of 19th October and 30th November, 1842,) and therefore not sufficient to discharge a lien. Besides *Alexander v. Southey*, J. W. Smith cited *Green v. Dunn*, 3 Camp. 215 ; *Strong v. Harvey*, 3 Bing. 304 ; *Cheminant v. Thornton*, 2 Car. & P. 50 ; *Sutton v. Hawkins*, 8 Car. & P. 259. [Patteson, J. I do not see any qualification here ; it was only an exclusion of her liability. What did the admission of it signify to them, if they got the money ? Wightman, J. She merely says, I am not obliged to pay, but I will. Lord Denman, C. J. Is a person who makes a tender bound to admit that he is liable for what he tenders ?]

Mynn v. Jolliffe, 1 M. & Rob. 326, was also cited for the defendants in this part of the argument, as showing that it was no part of the defendants' duty as solicitors, to receive payment of the mortgage money.

(b) See *Wakefield v. Newbon*, ante, p. 276.

Regina v. The Tithe Commissioners, In the matter of The Ystradgunlais Commutation,

will be reported in the next volume, with

Regina v. The Tithe Commissioners, In the matter of The Dent Commutation.

END OF TRINITY VACATION.

- *452] *The Court, during the last term, promulgated the following regulations.

DIRECTIONS TO THE TAXING OFFICERS.

In lieu of the Directions of Hilary Vacation, 4 W. 4, 1834, 5 B. & Ad. xix., so far as relates to the Scale of Costs in cases where the sum recovered, &c., does not exceed 20*l*.

THAT in all actions of assumpsit, debt, or covenant (*a*) where the sum recovered or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l*. without costs, the costs both of the plaintiff and defendant, and as well between attorney and client as party and party, except as hereinafter excepted, shall be taxed according to the reduced scale hereunto annexed.

Provided that, in case of trial before a judge in one of the superior courts, or judge of assize, if the judge shall certify on the positea that the cause was proper to be tried before him and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale.

Where, in like actions, the sum endorsed on the summons shall be more than 20*l*. but the plaintiff fails to recover more than that sum, and the judge does not certify as aforesaid, the plaintiff's costs, as well between party and party as also between attorney and client, shall be taxed as upon a writ of trial before a judge of a court of record, where attorneys are not allowed to act as advocates as hereinafter provided for; but the defendant's costs, if any, are to be taxed upon the usual scale.

Provided also that, in cases triable before the sheriff or judge of an inferior court, where the judge shall refuse to make an order for such trial, the judge shall, if he shall think fit, direct, at the time of such refusal, on what scale the costs of each party shall be taxed; and, in default of such direction, the costs of both parties shall be taxed on the usual scale.

*453] *GENERAL ALLOWANCE FOR PLAINTIFFS AND DEFENDANTS.

As well between attorney and client as between party and party, in actions not exceeding 20*l*.

	£	s.	d.
Writing Letter, where Letters are usually allowed	-	0	2 0
Instructions to Sue, Defend, or to Draw Pleadings or special Affidavits, where			
Instructions are usually allowed	-	0	3 4
Writ of Summons	-	0	12 6
Alias	-	0	10 0
Pluries	-	0	10 0
Endorsing Costs on Writs	-	0	2 0
Service of Writ of summons, Alias, or Pluries	-	0	5 0
Extra Service at 6d. per mile, if served out of the town in which the attorney			
resides, not exceeding	-	0	5 0
Affidavit of Service, including Oath	-	0	5 0
If Writ sent to a correspondent, Writing him with Writ and Instructions, and			
his writing in reply, 2s. each	-	0	4 0
Paid correspondent's Charges extra for Mileage, 6d. per mile, as before, not ex-			
ceeding 5s.	-	0	5 0
Drawing and Engrossing special Affidavits, per folio	-	0	1 0
Nothing for Attending to be Sworn.			
Searches, such as for Appearance, Declaration when filed, and Rule to plead	-	0	3 4
Attending to procure Duplicate of Order, Office Copy of any Rule or Affidavit,			
Writ, Judgment, or other Document when necessary	-	0	3 4
Entering Appearance for Defendant, or sec. Stat.	-	0	6 0
Drawing Pleadings, per folio	-	0	1 0
Engrossing, per folio	-	0	0 4
Close Copy, when Country Agency, per folio	-	0	0 4
Fee to Counsel or Pleader, when special	-		
Attending him	-	0	3 4
No Advising on evidence as between Party and Party, but to be allowed as be-			
tween Attorney and Client when necessary			

(*a*) By a further regulation of the judges, (Easter term, 1846,) it is "Ordered that the directions to the taxing masters be altered, by inserting after the words 'actions of assumpsit, debt, or covenant,' the words 'other than cases wherein by reason of the nature of the action no writ of trial can by law be issued.'"

	£	s.	d.
Drawing special Notices to admit or produce copy and service	-	-	0 5 0
Copy for Judge	-	-	0 2 0
Extra for Service, if necessarily served at a distance, or sent to a correspondent, the same as for serving Writs.	-	-	-
Copy Notice sent, served by adverse party, if Agency	-	-	0 2 0
Notice of Declaration, Copy and service	-	-	0 5 0
*Short Particulars to accompany	-	-	[*454 0 2 6]
If Notice served at a distance, or sent to a correspondent, the same as for serving Writs, &c.	-	-	-
Drawing long Particulars and fair Copy, exceeding three folios, at, per folio,	-	0	0 4
Rule to plead	-	-	0 1 6
Rule to apply, rejoin, &c., Copy and Service	-	-	0 4 0
Demanding Pleadings, residence of Plaintiff, authority for issuing Writ and other common Notices, Copy and Service	-	-	0 3 0
Copy and Service of Summonses	-	-	0 3 0
Attending Summonses, or giving Consent	-	-	0 3 4
Copy and Service of Orders usually served	-	-	0 3 0
When Costs taxed under an Order or Rule, Attending to get an appointment thereon	0	3	4
Copy and Service of Rules	-	-	0 4 0
Paying money into Court	-	-	0 3 4
Taking it out	-	-	0 6 8
Replication, accepting money in full demand	-	-	0 3 0
Close Copy, Agency.	-	-	0 1 0
Similer, by Replication, or Rejoinder, or the like, where a separate Pleading, and not made up with the Issue	-	-	0 3 0
Nothing for close Copy.	-	-	-
Drawing Interlocutory or Final Judgment	-	-	0 3 4
Attending to Sign	-	-	0 3 4
Engrossing Proceedings on paper, per folio,	-	-	0 0 4
Entering on Roll, per folio,	-	-	0 0 4
Plea of general issue	-	-	0 3 0
Close Copy, Agency	-	-	0 1 6
Close Copy of common Rules	-	-	0 1 0
Ditto of Orders ditto	-	-	0 1 0
Ditto of special Rules or Orders, per folio,	-	-	0 0 4
Drawing Abstract of Pleas and fair Copy, and Copy for Judge	-	-	0 3 0
No close Copy	-	-	-
Drawing Issue, of whatever length	-	-	0 3 4
Attending to pay Pleading Fee	-	-	0 3 4
Notice of Trial, or Inquiry	-	-	0 3 0
No close Copy	-	-	-
If served on Defendant, or at a distance, or sent to a correspondent, to be served, the same as serving Writ, &c.	-	-	-
Engrossing Writ of Trial or Inquiry, per folio,	-	-	0 0 4
Fee thereon, but no Fee on drawing	-	-	0 3 4
Copy Particulars to annex, if short,	-	-	0 1 0
If more than three folios, per folio,	-	-	0 0 4
Subpoena	-	-	0 5 0
Copy and Service	-	-	0 3 0
*Subpoena duces tecum	-	-	[*455 0 7 0]
Copy and Service	-	-	0 4 0
If either served at a distance, or sent to a correspondent to serve, same extra as serving Writ.	-	-	-
Minutes of Evidence, or Instructions for Brief	-	-	0 13 4
Drawing Brief and one fair copy where Cause tried before a Judge of a Court of Record, where Attorneys are not allowed to act as Advocates, not exceeding	2	0	0
Paid Fee to Counsel, (one guinea,) and Clerk	-	1	3 6
Attending him	-	-	0 3 4
Attending to enter Cause for Trial	-	-	0 3 4
Attending Court on Writ of Trial or Inquiry in same town	-	-	0 13 4
Attending Court when Cause did not come on, each day,	-	-	0 6 8
When necessary, Attending for and altering Writ of Trial or Inquiry, and Attending to reledge same	-	-	0 3 4

455 DIRECTIONS TO THE TAXING OFFICERS. T. T. 1844.

	£	s.	d.
Altering and Resealing Subpoenas, whether one or more, besides what is paid	-	0	3 4
Re-serving same when done and necessary, if at a distance, or sent to a correspondent, as before.			
If the Attorney attending a Writ of Trial has to go a distance, Mileage 1s. one way.			
Attorney attending Trial at a distance, one Guinea per day as long as necessarily detained in going to, attending, and returning from, the Trial, if no other business; or, if other business, in the whole not to exceed two Guineas a day.			
If more than one Cause, mileage to be apportioned; if more than two other Causes, no mileage.			
Attending for special Rules, when not made upon Motion in Court	-	0	3 4
Affidavit of Increase, including Oaths	-	0	5 0
Copy for the opposing party	-	0	2 0
Bill of Costs and Copy, at 8d. per folio, not to exceed	-	0	4 0
Copy for the opposing party, 4d. per folio, not exceeding	-	0	4 0
Notice of Taxing	-	0	3 0
Attending Taxing	-	0	3 4
If long, in Master's discretion	-	0	6 8
Instructions to Counsel on common Motions	-	0	3 4
Attending Court on Motion, Rule Nisi granted, and Attending to draw up Rule	0	6	8
Attending Court each day on special Motions or Argument, not exceeding 20s.			
a Term,	-	0	3 4
Ditto when heard	-	0	6 0
Attending to Settle and Drawing, and fair Copy, Cognovit, and getting same signed	-	0	10 0
Copy for Agent to keep	-	0	2 0
*456] *Attending Filing, when filed under the Statute	-	0	3 4
Attending Stamping, when done and necessary	-	0	3 4
Attending Judges with Pleadings, Demurrer Book, special Case, &c., one Fee	-	0	3 4
Attending Searching, if Copy delivered to the other Judges, one Fee	-	0	3 4
Term Fee in Town	-	0	10 0
Country	-	0	12 0
Letters, when no Term Fee, Town	-	0	2 0
Ditto, Country	-	0	4 0
N. B. When proceedings commenced in Vacation and continued to following Term, or commenced in Term and continued in the following Vacation, only one Term Fee in respect thereof, and no additional charges for letters.			

COSTS ON WRIT OF DISTRINGAS.

Attending at Defendant's House to make Appointment	-	0	3 4
Attending Appointment, and Copy and Service of Writ	-	0	5 0
If Appointment and Service at a distance, or writ sent to a correspondent, the same for Mileage and Correspondence, &c., as upon the Service of Writs.			
Searching for Appearance	-	0	3 4
Drawing and Engrossing Affidavit to ground Distringas, per folio, (No Instructions on Attending to be sworn.)	-	0	1 0
Paid Oath	-	-	-
Affidavit of no Appearance being entered and Oath	-	0	5 0
This to be allowed when it cannot be incorporated in the special Affidavit.			
Attending the Judge for Order for Distringas	-	0	3 4
Paid for same	-	0	3 0
Writ of Distringas	-	0	12 6
Attending for Warrant	-	0	3 4
Copy Writ and Notice for Defendant	-	0	2 0
The like for Sheriff	-	0	2 0
Paid for Warrant, as usual.			
Instruction Sheriff's Officer	-	0	3 4
Paid Officer, as per scale of Sheriff's Fees.			
Attending for Order to return Writ	-	0	3 4
Paid for same	-	0	2 0
Copy and Service and paid Sheriff therewith	-	0	4 0
Short Copy of Writ and Return	-	0	1 0
Paid for Return	-	0	2 0

	£	s.	d.
Attending for Return and to file same, when Sheriff not ruled or ordered to return it	-	0	3 4
*Drawing and Engrossing Affidavit of Officer, Nulla Bona and Oath (No Instructions, or Attending to be sworn.)	[*457	0	5 0
Searching again for appearance	-	0	3 4
Affidavit of no Appearance and Oath	-	0	5 0
Attending Judge for Order for leave to enter Appearance	-	0	3 4
Paid for the Order, and filing Affidavit, if Writ obtained	-	0	3 0

IN TERM TIME, ADDITIONAL

Briefing Affidavit for Counsel, per folio,	-	0	0 4
Instructing Counsel	-	0	3 4
Fee to Counsel	-	0	10 6
Attending him and Court, and to draw up Rule	-	0	3 4
Paid for the Rule, and Filing Affidavit	-	0	5 0
The like Charges on obtaining Rule for leave to enter an Appearance for Defendant.			

BILL OF COSTS UPON WRIT OF SUMMONS.

Where Debt and Costs paid within the four days, or upon a Judge's Order, when time given for payment.

Letter before Action, if sent	-	0	2 0
Instructions to sue	-	0	3 4
Writ of Summons	-	0	12 6
Bill of Costs to Endorse	-	0	2 0
Copy and Service	-	0	5 0
If served at a distance, or sent to a correspondent (same as on service of Writs, ante.)			
Attending Settling Letters, as before.	-	0	3 4

IF TIME GIVEN.

Attending Defendant on his Applying for Time to pay Debt and Costs, and

Attending on Plaintiff, and getting his consent, and Agreeing on terms, &c.

Drawing consent for a Judge's Order and fair Copy, and Attending getting same signed, (one Fee,) not exceeding	-	0	6 8
Paid for Summons and Order	-	-	-
Attending for same	-	0	3 4
Attending for Appointment to Tax, if necessary	-	0	3 4
Copy and Service of Order, if necessary	-	0	3 0
Bill of Costs and Copy	-	0	3 0
Copy for the other side, if made	-	0	1 6
Attending taxing	-	0	3 0
*Paid	[*458		
Letters, &c., as before.			

DECLARATION IN DEBT AND FINAL JUDGMENT BY DEFAULT.

(For the previous Costs, see ante.)

Searching Appearance	-	0	3 4
Affidavit of Service	-	0	5 0
Entering Appearance sec. stat.	-	0	6 0
Instructions for Declaration	-	0	3 4
Drawing same, folio 4.	-	0	4 0
Fee to Pleader, if special	-	-	-
Attending him	-	0	3 4
Engrossing Declaration	-	0	1 4
Close Copy, if Agency	-	0	1 4
Particulars of Demand	-	0	2 6
Rule to Plead	-	0	1 6
Demand of Plea (if appearance entered by Defendant)	-	0	3 0
Drawing Final Judgment	-	0	3 4
Attending to sign	-	0	3 4
Engrossing proceedings on paper, folio 9	-	0	3 0
Entering on the Roll	-	0	3 0
Paid Roll	-	0	0 10
Paid Signing Judgment	-	0	7 0

	£	s.	d.
Paid Usher - - - - -	-	0	1 0
In C. P., 3s. extra for Docket.			
Drawing Bill of Costs and Copy, as before.			
Copy for Defendant's Attorney, ditto.			
Notice of Taxing, if Defendant entitled thereto	-	0	3 0
Attending Taxing	-	0	3 4
Paid Taxing	-		
Term Fee in Town	-	0	10 0
Ditto in Country	-	0	12 0

INTERLOCUTORY JUDGMENT AND INQUIRY.

Drawing Interlocutory Judgment	-	-	0	3	4
Attending to Sign same	-	-	-	0	3 4
Paid Signing	-	-	-	-	0 5 0
Engrossing Proceedings on paper, folio 8; if Declaration, folio 4.	-	-	-	-	0 2 8
Entering on the Roll	-	-	-	-	0 2 8
Paid for Roll	-	-	-	-	0 0 10
Instructions for and Drawing Inquiry	-	-	-	-	Nil
Engrossing Inquiry, folio 8.	-	-	-	-	0 2 8
*459] *Paid for Parchment	-	-	-	-	0 2 0
Paid Signing and Sealing	-	-	-	-	0 5 0
Fee thereon	-	-	-	-	0 3 4
Notice of Inquiry, Copy and Service	-	-	-	-	0 3 0
If at a distance, or sent to a correspondent, the extra charges the same as Serving Writ as before.					
Attending to leave Inquiry with the Sheriff	-	-	-	-	0 3 4
Paid thereon	-	-	-	-	0 4 0
If sent to a correspondent to lodge with Sheriff or to Undersheriff, Writing therewith					
For Agent's Charges for lodging Writ with Sheriff, and Letter in reply	-	-	-	-	0 5 4
Paid for Deputation, if a saving of expense	-	-	-	-	1 1 0
Attending for same and Writing therewith	-	-	-	-	0 3 4
Subpena	-	-	-	-	0 5 0
Copy and Service on each Witness	-	-	-	-	0 3 0
If Served at a distance, or sent to a correspondent, as before.					
Minutes of Evidence	-	-	-	-	0 6 8
Attending Inquiry, if in same Town with Attorney	-	-	-	-	0 13 4
If attended by Agent to him	-	-	-	-	1 1 0
Paid Sheriff executing Inquiry, Bailiffs, Jury, &c., (including the 4s. paid on Leaving,) not exceeding	-	-	-	-	1 15 0
Paid Sheriff for Travelling expenses, according to scale.					
Paid for use of Room, when necessary, according to scale.					
Paid Witnesses, according to general allowance.					
Affidavit of Increase	-	-	-	-	0 5 0
Attending for Inquiry	-	-	-	-	0 3 4
Paid for same	-	-	-	-	0 1 0
Drawing Judgment	-	-	-	-	0 3 4
Attending to sign	-	-	-	-	0 3 4
Paid Signing	-	-	-	-	0 7 0
Paid Ushers	-	-	-	-	0 1 0
In C. P., 3s. more.					
Paid Filing Affidavit of Increase	-	-	-	-	0 1 0
Copy for Defendant's Attorney, not exceeding	-	-	-	-	0 2 0
Drawing Bill of Costs and Copy as before	-	-	-	-	0 4 0
Copy for Defendant's Attorney, if done, as before.					
Notice of Taxing, if Defendant has appeared, or is entitled thereto	-	-	-	-	0 3 0
Attending Taxing	-	-	-	-	0 3 4
Paid Taxing as usual.					
No Attending to Complete Judgment on Roll.					
Term Fee as before.					
*460] *WRIT OF TRIAL.					
General Issue pleaded, Drawing Replication, including close Copy, if Agency	-	-	-	-	0 3 0
Paid for Summons for Writ of Trial	-	-	-	-	0 1 0
Copy and Service	-	-	-	-	0 3 0

	£	s.	d.
Attending - - - - -	0	3	4
Paid for Order - - - - -	0	1	0
Copy and Service - - - - -	0	3	0
Drawing Issue, of whatever length - - - - -	0	3	4
Engrossing to Deliver, folio 8, (if Declaration, folio 4.) - - - - -	0	2	8
Entering on the Roll - - - - -	0	2	8
Paid for Roll - - - - -	0	0	10
Close Copy, if agency - - - - -	0	2	8
Notice of Trial, including close Copy, if agency - - - - -	0	3	0
Engrossing Writ of Trial, folio 12 - - - - -	0	4	0
Paid Parchment - - - - -	0	2	0
Paid Signing and Sealing - - - - -	0	2	0
Fee thereon - - - - -	0	3	4
Copy Particulars to annex - - - - -	0	1	0
Attending to leave Writ at Sheriff's Office, Subpoena and Serving Witnesses, the same as upon Writ of Inquiry.			
Notice to produce Copy and Service not exceeding - - - - -	0	5	0
The like to Admit ditto - - - - -	0	5	0
Attending Inspection, (Plaintiff or Defendant) - - - - -	0	3	4
Paid Summons to Admit - - - - -			
Copy and Service - - - - -	0	3	0
Attending - - - - -	0	3	4
The like Charge on 2d Summons, if first not attended - - - - -	0	8	4
Affidavit of Service and Attendance - - - - -	0	5	0
Paid for Order - - - - -			
Copy and Service - - - - -	0	3	0
Attending Trial, as before.			
If Writ altered or re-sealed, and Witnesses re-served, as before.			
Paid Sheriff's Fees, (including the 4s. paid with Writ,) not exceeding in Country Causes - - - - -	1	15	0
Paid for Room, where necessary, according to scale.			
Paid for Deputation, &c.			
Paid Sheriff extra for Travelling, same as on Inquiry; such payments in Town Causes not exceeding - - - - -	1	13	0
The Charges for Final Judgment, the same as upon Writ of Inquiry.			
Bill of Costs and Copy, and Attending Taxing, as before.			
Term Fee, as before.			

*IF SPECIAL PLEAS.

[*461]

The Charges to be regulated according to the lengths, and Order and Rules to plead
several matters, as usual.

MOTION FOR A NEW TRIAL UPON WRIT OF TRIAL.

Attending the Undersheriff for a Copy of his notes - - - - -	0	3	4
Paid for same - - - - -			
Affidavit to Verify same - - - - -	0	5	0
Instructions for Counsel to Move - - - - -	0	6	8
Making Copy of Sheriff's Notes to accompany, per folio, - - - - -	0	0	4
Paid Fee - - - - -	1	3	6
Attending - - - - -	0	3	4
Attending Court, Rule nisi granted, and for Rule - - - - -	0	6	8
Paid for Rule and Filing Affidavit - - - - -	0	5	0
Cpy and Service - - - - -	0	4	0
Affidavit of Service - - - - -	0	5	0
Instructions for Counsel to move Rule Absolute - - - - -	0	3	4
Copy Rule to Annex - - - - -	0	1	0
Paid Counsel to move, from one Guinea to two Guineas.			
Attending him - - - - -	0	3	4
Attending Court, Motion did not come on, 3s. 4d. each day, not to exceed 20s. in a Term.			
Attending Court—Rule Absolute - - - - -	0	6	8
Paid for the Rule and Filing Affidavit - - - - -	0	5	0
Copy and Service - - - - -	0	4	0

461 DIRECTIONS TO THE TAXING OFFICERS. T. T. 1844.

	£	s.	d.
Copy sent, if agency - - - - -	-	0	1
Term Fee, as usual.	-	0	0

COMPUTING PRINCIPAL AND INTEREST ON JUDGE'S ORDER.

Costs of Declaration and Judgment, as before, according to length of Declaration.

The usual charges for Summons and Order to Compute the same, as upon Order

to Admit upon Writ of Trial.

Instructions for Counsel to Move for Rule - - - - -	-	0	3	4
Paid Counsel to Move - - - - -	-	0	10	6
Attending him and to Draw up Rule - - - - -	-	0	3	4
Paid for rule - - - - -	-	0	5	0
Attending for Appointment to Tax - - - - -	-	0	3	4
Copy and Service of Rule and Appointment - - - - -	-	0	4	0

Bill of Costs and Copy and for Final Judgment, the same as in Judgment in Debt.

If defendant served at a distance, extra for Serving Summons and Rules to Compute, same as Serving Writ.

*462] *IF IN TERM TIME.

Affidavit of Cause of Action - - - - -	-	0	5	0
Instructions for Counsel to Move - - - - -	-	0	3	4
Fee to him - - - - -	-	0	10	6
Attending him and Court, and to Draw up Rule - - - - -	-	0	6	8
Paid for Rule - - - - -	-	0	5	0
Copy and Service - - - - -	-	0	4	0
Affidavit of Service - - - - -	-	0	5	0
Instructions to make Rule Absolute - - - - -	-	0	3	4
Copy Rule to Annex - - - - -	-	0	1	0
Fee to Counsel - - - - -	-	1	3	6
Attending him and Court, and to Draw up Rule - - - - -	-	0	6	8
Paid for Rule - - - - -	-	0	5	0
Attending for Appointment to Tax - - - - -	-	0	3	4
Copy and Service - - - - -	-	0	4	0

No Attending at Westminster to Complete Roll.

If Defendant served at a distance, extra for Serving Summons and Rule to Compute the same, as Serving Writ.

COSTS OF EXECUTION.

Writ of Fi. Fa., if only one Writ, or a Testatum - - - - -	-	0	7	0
Attending for Warrant - - - - -	-	0	3	4
Paid for Warrant, as usual.				
Instructing Officer - - - - -	-	0	3	4
If previous Writ issued, where Venue is laid to ground Testatum Writ Fi. Fa. - - - - -	0	6	0	
Attending to Lodge same with Sheriff, and Instructing him to return Nulla bona, and afterwards for Return - - - - -	-	0	3	4
Paid for Return - - - - -	-	0	2	0
Short Copy of Writ and Return to keep - - - - -	-	0	1	0
Paid Filing Writ and Return, and Attending - - - - -	-	0	3	4

The foregoing charges are intended as examples. The Masters will exercise their discretion in allowing for attendances, having regard to the expense saved, or favour granted, to the party, and to all the circumstances of the case, bearing in mind that for attendances the allowances are not to be more than half what are allowed when costs are taxed upon the usual scale. In other cases not hereby provided for, the Masters will conform to the rate of charges hereinbefore inserted, or as near thereto as circumstances will allow.

(Signed)	DENMAN, N. C. TINDAL, FRED. POLLOCK, J. PARKE, E. H. ALDERSON,	J. PATTERSON, J. GURNEY, J. WILLIAMS, J. T. COLERIDGE, T. COLTMAN,	R. M. ROLFE, WM. WIGHTMAN, C. CRESSWELL
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CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Michaelmas Term and Vacation,

VIII. VICTORIA.

The judges who usually sat in banc in this term and vacation were,

LORD DENMAN, C. J.

COLERIDGE, J.

WILLIAMS, J.

WIGHTMAN, J.

MEMORANDA.

Mr. Justice **ERSKINE**, in last Trinity vacation, resigned his seat in the Court of Common Pleas on account of ill health.

In the same vacation, *William Erle*, of the Middle Temple, Esq., one of her majesty's counsel, was appointed a judge of the Court of Common Pleas, in place of Mr. Justice **ERSKINE**, having first been called to the degree of serjeant at law, when he gave rings with the motto *Justitiæ tenax*. After his appointment he received the honour of knighthood.

In the same vacation, *Edward Bellasis*, of the Inner Temple, Esq., *James Alexander Kinglake*, of Lincoln's Inn, *Esq., and *Charles Chadwicke Jones*, of the Middle Temple, Esq., were called to the degree of [*464 serjeant at law, and gave rings with the motto *Paribus legibus*. And,

John Hodgson, of Lincoln's Inn, Esq., *Charles Howard Whitehurst*, of the Middle Temple, Esq., and *William John Alexander*, Esq., *Robert Charles Hildyard*, Esq., and *James Parker*, Esq., all of Lincoln's Inn, were appointed her majesty's counsel.

GOODALL v. LOWNDES. *Nov. 2.*

Guardians of a poor law union indicted plaintiff for disobeying an order of sessions for maintenance of a bastard. Before trial, plaintiff offered a compromise; and the clerk to the guardians, on their behalf, agreed with him for a sum, on account of costs and maintenance, which he paid; and the indictment was dropped. Afterwards, plaintiff discovered that the order of sessions was defective and void; and he brought *assumpsit* against the clerk for money had and received.

Held, that the clerk was not liable, having done nothing in the prosecution beyond preferring the indictment.

And that, if the compromise was illegal, plaintiff, being in *pari delicto* with the other parties offending, could not sue them for money which he had paid.

ASSUMPSIT for money had and received, and on an account stated. Plea, *non assumpsit*.

On the trial, before TINDAL, C. J., at the last Staffordshire assizes, the material facts appeared to be as follows.

The guardians of the Wolstanton and Burslem union, and the overseers of the parish of Wolstanton, in Staffordshire, applied at petty sessions for an order of maintenance against the plaintiff as the father of a bastard child then chargeable to the said parish. Plaintiff entered into recognisance under stat. 2 & 3 Vict. c. 85, s. 3, and removed the case to the quarter sessions, where an order was made, finding him to be the father, and ordering him to pay 2s. a week for maintenance, and 26*l.* 13*s.* 10*d.* to the said guardians and overseers for costs. Plaintiff refused payment; the *guardians preferred an indictment against him at the sessions for [*465 misdemeanor in disobeying the order; and the grand jury found a true bill. Plaintiff removed the indictment into this court by *certiorari*: but, before the time for trial, he sent his attorney to the board of guardians to arrange a settlement. The attorney appeared at a meeting of the board as plaintiff's representative; he there saw the defendant, the clerk to the guardians, and agreed to pay 80*l.* for costs, on the indictment being discontinued. He gave defendant a check for 80*l.* 9*s.* 10*d.*, and defendant gave a memorandum that he had received 26*l.* 13*s.* 10*d.*, costs awarded by the quarter sessions, 3*l.* 16*s.* for maintenance, and 50*l.* towards costs of the indictment, which was not further prosecuted. Afterwards it was discovered that the order of the quarter sessions had defects on the face of it which, as was alleged on the plaintiff's part, made it wholly invalid; and the plaintiff's attorney represented this to the defendant, and asked him to repay the 80*l.* 9*s.* 10*d.* The defendant suggested that the attorney should write to him in his capacity of clerk to the board of guardians; and, in answer to a letter so written, stated that the board declined to entertain the question.

At the trial, the defendant's counsel urged that this action did not lie against a party who had acted merely as clerk to the guardians; and the lord chief justice observed that, besides this difficulty, there was no duress proved, the plaintiff having voluntarily sent his attorney to make the compromise; and that a man might, if he chose, pay money under an invalid order, particularly where he was bound morally to make the payment: and

his lordship added that he was not prepared to say that compounding a misdemeanor was in all cases an illegal act. The plaintiff was nonsuited, but leave given to move to enter a verdict for the amount claimed. [*466]

Whateley now moved accordingly. (a) *Unwin v. Leaper*, 1 Man. & G. 747, shows that money extorted by the threat of process under a penal law may be recovered in an action for money had and received. This case is the same in principle with *Townson v. Wilson*, 1 Campb. 396, where a party, having paid money to overseers, under duress, to indemnify them for future charges of a bastard, was held entitled to recover it back in this form of action. *Chappell v. Poles*, 2 M. & W. 867, is a similar case. And the compromise here was unlawful according to the rule laid down by this court in *Keir v. Leeman*, ante, p. 308, the object being to stifle a prosecution for an offence of a public nature. [Lord DENMAN, C. J. The difference between that case and this is, that the money here has actually been paid.] That the defendant here received the payment as an agent only, is immaterial: in *Townson v. Wilson*, 1 Campb. 396, and *Chappell v. Poles*, 2 M. & W. 867, the defendants had gone out of office, and paid over the money, before action brought. The receipt as agent, and payment over to the principal, was also held to be no answer in *Miller v. Aris*, 1 Selw. N. P. 103, 11th ed. (b) If any thing here discharges the defendant from liability, it would seem, by an observation of PARKE, B., in *Chappell v. Poles*, 2 M. & W. 867, that he ought to have pleaded it. It was said, on the trial, that the payment could not be compulsory, because the plaintiff sent his attorney and made the compromise of his own accord. But he did it under coercion. And, if the money was obtained in enforcement of an illegal compact, it is no matter whether the very act of paying was [*467] voluntary or not. In *Feltham v. Terry*, 1 T. R. 387, (cited in *Birch v. Wright*), S. C. 1 Cowp. 419, (cited in *Lindon v. Hooper*), an overseer of the poor levied money on an illegal conviction, which was afterwards quashed; and it was held that the convicted party might waive the tort and bring assumpsit for money had and received against the overseer for the clear sum in his hands. The order of quarter sessions, as framed, was a nullity. [Lord DENMAN, C. J. We propose to take that for granted at present.] The exacting so large a sum was a gross extortion.

Cur. adv. vult.

Lord DENMAN, C. J., in the same term, (November 18th,) delivered the judgment of the court.

In this case the amount levied certainly seems to have been excessive; but we think that the plaintiff could not recover it back. No proceeding of the defendant's appears, beyond preferring the indictment. The facts do not prove extortion by duress, nor warrant an action against him for money

(a) Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Ja.

(b) See the authorities cited in *Wakefield v. Newbon*, ante, p. 276, and in *Davies v. Vernon*, ante, p. 443.

had and received. And, if the transaction was wrong, the parties are in *pari delicto*, and one of them cannot, after voluntarily paying his money, repent and then sue the other. In *Unwin v. Leaper*, 1 Man. & G. 747, where the plaintiff had paid his money on a threat to sue him in a penal action, that was properly considered as duress; but here all was voluntary.

Rule refused.

*468] *CLIFTON v. HOOPER and Another. Nov. 4.

If the sheriff, having a writ of execution delivered to him, unnecessarily delay putting it in force, an action on the case lies against him at the suit of the execution creditor, though no actual pecuniary damage has arisen from the default.

The measure of damages for such default is not necessarily the whole debt, but such a sum as the jury think equivalent to the real loss.

If there has been no actual loss, still, in the case of final process, the plaintiff must have nominal damages.

It is sufficient, in such action, if the jury find that the sheriff could have executed the process and omitted doing so; it need not be expressly found that he ought to have executed.

CASE. The declaration stated that plaintiff recovered a judgment in B. R. against John Regan for a certain debt and damages, and, for satisfaction thereof, sued out a *ca. sa.* against Regan, directed to the sheriff of Middlesex, endorsed to levy 29*l.* 13*s.* 2*d.* and interest, &c., which writ so endorsed was delivered to defendants, then being sheriff of Middlesex, to be executed. Averment, that Regan, at the time of such delivery, and thence until the commencement of this suit, was within the sheriff's bailiwick, and, although, after the delivery, &c., and before the commencement, &c., a reasonable time had elapsed for arresting Regan, and defendants, as sheriff, could and might and ought to have arrested Regan by virtue of the writ, if they would so have done, whereof defendants as sheriff during all that time had notice, yet defendants, not regarding, &c., but contriving, &c., did not nor would, though often requested, at any time take or cause to be taken the said Regan, as by the writ they were commanded, but therein failed, &c.: by means whereof plaintiff hath been and is greatly injured, and deprived of the means of obtaining the moneys so endorsed on the writ, &c., and of the said moneys, which are still wholly unpaid, and is likely to lose the same.

The second count, after an inducement as in the first count, alleged that Regan, at the time of the delivery, &c., and thence until the commencement, &c., was within the bailiwick, &c., and, as before, that defendants
*469] *omitted to take, &c., although, &c., and that they falsely returned *Non est inventus*, whereas Regan was found, and might have been taken and arrested according to the exigency of the writ: by means of which return, and the non-observance of the writ, plaintiff hath been and is injured and delayed in recovering his said debt, and is likely to lose the same, and hath incurred costs, &c., and is likely to lose the means of recovering his costs expended in the suit against Regan, amounting, &c.

Pleas. 1. Not guilty. 2. To the first count, that Regan, during the time mentioned, was not within the bailiwick, nor could, nor might, nor ought defendants to have arrested him in manner and form, &c. 3. The like plea to the second count. Issues thereon.

On the trial, before WIGHTMAN, J., at the sittings in Middlesex after Michaelmas term, 1843, it appeared that Regan was a trader, carrying on business in London. The writ against him was placed in the sheriff's hands on November 12th, 1842. Regan absented himself from town on the 10th, knowing that judgment had been signed; he returned on the 5th of December, having in the mean time petitioned the Court of Bankruptcy for a protection under stat. 5 & 6 Vict. c. 116, s. 1. The protection was granted on December 6th. Evidence was given on the plaintiff's part to show that, between November 12th and December 6th, the defendants might, with due diligence, have arrested Regan, and that, if he had been arrested, the plaintiff might have recovered some portion of the debt. Plaintiff obtained an order to the sheriff to return the writ; and he, on December 29th, returned *Non est inventus*. Regan's petition afterwards came on for hearing, and was discharged. Plaintiff then caused Regan to be arrested on an alias *ca. sa.*; *whereupon Regan petitioned the Insolvent Debtors' Court and obtained his discharge, plaintiff receiving no satisfaction for his debt. [470] WIGHTMAN, J., left it to the jury to say, in the first place, whether defendants could, with reasonable diligence, have arrested Regan between November 12th and December 6th; and secondly, if the defendants could have arrested, what damage the plaintiff had sustained by the default; and his lordship observed that, if the defendants were in default, the plaintiff would, at all events, be entitled to nominal damages; but *Kennedy*, for the defendants, referred to *Williams v. Mostyn*, 4 M. & W. 145; and WIGHTMAN, J., then said to the jury: "If you think there was some default, then I will ask whether you think there was *any* damage. If you think it was useless to take Regan, and that the plaintiff sustained no damage by the omission, you will tell me so." The jury found that the sheriff was in default, but that the plaintiff had sustained no damage; and the learned judge directed a verdict for the defendants, giving leave to move to enter a verdict for the plaintiff as after mentioned.

Warren, in Hilary term, 1844, obtained a rule to show cause why a verdict should not be entered for the plaintiff for the full amount of the judgment debt, or for nominal damages.

Kennedy now showed cause. As to the suggestion that a verdict should be entered for the whole debt; even in the case of an escape, if the plaintiff proceeds by action of debt on statute, (Westm. 2, 1 stat. 13 Ed. 1, c. 11, and 1 R. 2, c. 12,) he is entitled to recover the *whole debt,(a) but, if he sues in case, he will recover such damages only [471] as the jury choose to give: note (2) to *Jones v. Pope*, 1 Wms. Saund. 36.(b)

(a) See now stat. 5 & 6 Vict. c. 98, s. 31.

(b) And note (1), *ibid.* 6th ed. See *Ravenscroft v. Eyles*, 2 Wils. 294.

The only question, therefore, that can arise here is, whether or not the plaintiff should have nominal damages. *Williams v. Mostyn*, 4 M. & W. 145, shows that he is not entitled even to these. It will be suggested on the other side that *Williams v. Mostyn* was a case of default on mesne process, whereas here the process was final. But the judgment does not depend upon that distinction: a more substantial one is between the cases where the sheriff, on final process, has once arrested the debtor but has let him escape, and where no arrest has ever been made. *Brown v. Jarvis*, 1 M. & W. 704, S. C. Tyr. & G. 1033, was a case of the latter description, arising on mesne process; and the doubt there felt was, whether the plaintiff could recover without proof of damage. In the case of an escape the law contemplates some damage as necessarily accruing: thus it was said, in *Oguel and Paston's Case*, 2 Leon. 84, 87, 88, "that upon the escape, the common law gave an action upon the case against the sheriff; and the reason why the sheriff shall be charged, is, that one cannot be in execution but once; and then if the sheriff should not be charged, the party plaintiff should by negligence of the sheriff lose his suit, and also his debt." The consequences of an escape to the plaintiff are pointed out in *Atkinson v. Jameson*, 5 T. R. 25, and *Filewood v. Clement*, 6 Dowl. P. C.

*472] 508. But, where there has been no *escape, the reasons of the decision in *Williams v. Mostyn* apply, whether the process be mesne or final. *Barker v. Green*, 2 Bing. 317, may be cited on the other side, but is contrary to the more fully considered decision in *Planck v. Anderson*, 5 T. R. 37, and is virtually overruled by the Court of Exchequer, in *Williams v. Mostyn*. In *Lewis v. Morland*, 2 B. & Ald. 56, this court acted upon the principle that, where no actual damage has been sustained by an officer's omission, the party complaining of it cannot recover. The jury here have not found that the defendant ought to have arrested Regan, as the declaration alleges. Nor does it appear to have been even possible that damage should have resulted from the omission: and it is a principle that in actions of tort (with some exceptions which do not include the present case) damage is the gist of the action. [Lord DENMAN, C. J. *Williams v. Mostyn* was a good deal considered in a later case in this court.(a)

Warren, contrâ. It is a mistake to say that no wrong appears in this case by which damages can be measured. The sheriff committed a gross violation of his duty to the plaintiff, in neglecting for three weeks to execute his process. It is no answer to allege that actual pecuniary damage is not shown: the law presumes damage where there is clear injury to a right. That was the principle relied upon by Holt, C. J., in *Ashby v. White*, 2 Ld. Ray. 938, 958. The present case is analogous to *Marzetti v. Williams*, 1 B. & Ad. 415, where this court held that a party might recover in *case against his banker for improperly refusing to honour his check, *473] though no specific damage had resulted. The action there was founded on contract; but the want of that circumstance makes no material

(a) Probably *Wylie v. Birch*, 4 Q. B. 566.

distinction where there is a clear duty and a breach of it shown. In each case nominal damages at least are recoverable. In *Barker v. Green*, 2 Bing. 317, the Court of Common Pleas held that "if there was a breach of duty the law would presume some damage:" and that case is not overruled by the observations upon it in *Williams v. Mostyn*, 4 M. & W. 145. [Lord DENMAN, C. J., referred to *Bales v. Wingfield*; 4 Q. B. 580, note (a).] It would lead to serious irregularities if a sheriff were allowed to say, "true, I have neglected my duty, but you cannot show that I have done any wrong." [Lord DENMAN, C. J. You assume that we give no weight to the argument on the omission by the jury to find that the sheriff ought to have arrested. You will probably say that the opportunity involves the duty.] That is so. [Lord DENMAN, C. J. We are of that opinion.] The distinction between escape and omission to arrest is not relevant to this case: the distinction between defaults in the execution of mesne and final process is material, and makes *Williams v. Mostyn* a clear authority for the present plaintiff. The Court of Exchequer there laid it down that, when a prisoner is in execution on final process, the creditor has a right to the body of his debtor every hour till the debt is paid: but, on mesne process, his right is only to have the defendant in custody whenever he chooses to remove or declare against him: and the duty of the sheriff is correlative with *these rights respectively. In the latter case, if the creditor has not in fact lost an opportunity of removing or declaring, he has [*474 suffered no injury: in the former he is injured if his right to detain the body of the debtor is interrupted at any moment. The same argument applies where the debtor, in either case, goes at large after process issued, by the sheriff's laches in not arresting. Further, the plaintiff here ought to recover more than nominal damages. It is true that the debtor became insolvent soon after process issued: but it is uncertain what chance the plaintiff might have had of recovering his whole debt if the ca. sa. had been executed; and, in such a case, if the defendant, by his own wrong, puts it out of the plaintiff's power to measure the damages, he is liable to the whole claim. Here, consequently, the judgment debt must be the measure.

Lord DENMAN, C. J. As the finding of the jury is that the sheriff did not do his duty, the rule must be absolute for nominal damages. When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount. There is no authority to the contrary. *Williams v. Mostyn*, 4 M. & W. 145, is expressly to the point, if what is said there be applied to the case where the debtor might be arrested, but is not. The Court of Exchequer said there that, if a debtor is arrested on final process and escapes, there is a cause of action, though no pecuniary damage be shown; the creditor has a right to have the body in jail; and the escape of the debtor, for ever so short a time, is necessarily *a damage to him; and the action for an escape lies. But, as to the amount of damages, the plaintiff in such a [*475 case cannot say that he has lost the whole debt. He has lost the body of

the debtor ; but it must still be a question what that loss amounts to ; and that will be only so much as the jury think the detention would have been worth. Then, if no real loss has been sustained, the case becomes like *Marzetti v. Williams*, 1 B. & Ad. 415 ; the action lies for some damages, though not for any particular amount.

WILLIAMS, J. I am of the same opinion. The special finding of the jury is immaterial, except as to the amount of damages. An action did accrue by reason of the defendant's neglect of duty ; so far, the plaintiff's claim is supported ; and, under the circumstances, he is entitled to nominal damages.

COLERIDGE, J. There would be no difficulty here but for the case of *Williams v. Mostyn*, 4 M. & W. 145 ; but that shows a distinction between mesne and final process. The Court of Exchequer ground their judgment on the nature of the right supposed to be infringed. If the plaintiff has taken the prisoner in execution, he has a right to the detention of the body at all times ; and the loss of that advantage for an hour is an infringement of the right. That applies to the case where, final process having issued, the sheriff negligently omits to arrest. There, the plaintiff has a right of action for the very first hour during which the sheriff might arrest, but does not. But the amount of damages is a question for the jury. *476] *Mr. Warren contends that they must be measured by the whole amount of the debt. But it is equally open to the defendants' counsel to say that, if the debtor had been taken, no part of the debt might have been recovered. And there is a material distinction between the cases where the sheriff has omitted to arrest, and where he has arrested and the prisoner has escaped. In the latter case it may be said that the whole debt is lost in solido ; but, where no arrest has been made, the debtor may be arrested the next day, and the debt so recovered. Then ought the plaintiff to recover his whole debt in the action against the sheriff ? These considerations show that it must always be an open question for the jury what damage has been sustained.

WIGHTMAN, J. The plaintiff here certainly lost the benefit of a right which he had to detain the body of the debtor. That right may have been of no value ; but still there was some damage. The case is distinguishable from *Williams v. Mostyn*, 4 M. & W. 145, and from *Planck v. Anderson*, 5 T. R. 37, on the authority of which *Williams v. Mostyn* was decided. In those cases the plaintiff was not at any time delayed ; the suit always proceeded effectually. Here the plaintiff lost any satisfaction he might have obtained by the detention of the debtor so long as the sheriff was in default.

Rule absolute to enter verdict for nominal damages.

*LAKE v. The Duke of ARGYLL. Nov. 5. [*477

Certain persons proposing to form a company applied to defendant to become president, to which he assented, and permitted himself to be publicly named as president of such intended company. The company was never formed; but meetings preliminary to the formation of it were held, at one of which defendant presided.

Held, that a jury might, if they thought fit, infer that defendant by his conduct held himself out as contracting for work to be done in respect of such preliminary proceedings, though the order for such work and labour was not directly given by the defendant. And that defendant, if he so held himself out, was liable for the work performed.

ASSUMPSIT for goods sold and delivered, work and labour, money paid, money had and received, and on an account stated.

The bill of particulars contained charges for work performed in printing prospectuses, pamphlets, &c., and for the materials therein employed.

Plea: Non assumpsit. Issue thereon.

The cause was tried before Lord DENMAN, C. J., at the Guildhall sittings after Trinity term, 1844; when a verdict was found for the plaintiff, under circumstances which appear sufficiently by the judgment of the court.

Kelly, on this day, moved (a) for a rule nisi for a nonsuit or a new trial.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (November 25th,) delivered judgment as follows.

I was desired to direct a nonsuit, because there was no evidence to show the defendant's liability. I thought this impossible, as some proof was given of acts done by the defendant, on the effect of which the plaintiff had a right to take the jury's opinion. The case of *Wood* against the same defendant was quoted, (b) in which the chief justice of the Common Pleas had laid down the law, and summed up strongly for the defendant. I *adopted the same course, and laid down the law, I believe, in the [*478 very words there employed, observing, also, that there appeared strong reason to suppose that credit was given here to other persons, previously the plaintiff's customers, and not to the defendant. The jury in the Common Pleas found their verdict for the defendant. Here they found for the plaintiff. And a motion has been made for a rule to show cause why there should not be a nonsuit, or a new trial.

We expressed our opinion that there was no ground for nonsuit. Certain persons determined to form an emigration society, with a deed of settlement. They held some meetings, and afterwards obtained the defendant's consent to be named president of that society. Some meetings were held afterwards, at one of which the defendant acted as president, and signed resolutions there agreed on; among others, that their proceedings should be printed. He had been publicly held out as president of the intended association, in papers regularly transmitted to him. His grace had also

(a) Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

(b) *Wood v. The Duke of Argyll*, 6 M. & G. 928.

informed the lord mayor, in a correspondence relating to some sailors engaged in the Company's service, that he had at one time been a proprietor, but had withdrawn from the company.

On these facts, I asked the jury whether the defendant had held himself out as intending to pay for the work charged. They thought he had, and fixed him with the amount.

It did not appear that the company had ever been formed according to its intended constitution. But it may be proper to distinguish between acts done by the company in execution of their project, and acts done by those who held meetings preliminary to the erection of that company.

*479] In the former character, the tradesman may be bound to show that it was so created according to the announced terms: he might have no right to separate the statement, in a prospectus or any similar publication, that the defendant meant to be a member, from the accompanying statement that no company was to exist till a certain capital was raised, or a certain amount paid, or any other condition precedent complied with. But, when persons meet to prepare the measures necessary for calling the society into existence, attendance on such meeting and concurrence in such measures may be strong evidence that any individual there present, and taking part in the proceedings, held himself out as a paymaster to all who executed their orders; and, though not liable as a member or a shareholder, yet his declared intention to become the president or a member in whatever event, or to take a share under any conditions, may be material evidence to show that he authorized contracts with those whose services were required by what may be called the constituent body.

In this case the work done by the plaintiff was obviously necessary for their purposes. Part of it was ordered in the defendant's presence, by a resolution read by the defendant from the chair. The proof was not conclusive: the plaintiff might have been informed, or he might have believed from circumstances, that others were to pay him, and that the Duke was merely giving his name and presence to forward the general objects, without taking any part in employing him. The circumstances which might fairly have led to this inference were fully commented upon in the summing up. But we cannot say that the jury have done wrong in thinking *480] that they did not absolutely outweigh the defendant's conduct in the particulars above mentioned.

In Wood's action against the same defendant, (a) the claim was not precisely of the same nature. It was for maps, used apparently in the execution of the company's scheme of emigration, the accomplishment of the very object for which it was to be formed. Hence the question was properly confined to proof that it was so formed, and that the Duke of Argyll had become a member of it. There is no difference between the two summings up; nor is it at all certain that the same jury would not have found both the verdicts.

(a) *Wood v. The Duke of Argyll*, 6 M. & G. 928.

Possibly this view might lead to the opinion that the verdict is for too large a sum. Part of the work may have been properly charged, because done for preliminary purposes; part improperly, because done for that presumed or expected company which may have never been formed, or of which the defendant may never have been a member. But this division it would not be easy to make: it ought to have been pointed out on the trial, and is not the ground of the motion which we now refuse. (a) We only advert to it to prevent the supposition that the jury have so found their verdict in this case as to infer the defendant's liability to every contract made by the supposed company; the apprehension of which is stated to be the main reason for his resistance to Mr. Wood's demand. Each case of this nature must depend on its own circumstances, with reference to the effect of the defendant's language and conduct on the plaintiff's mind. [*481]

Rule refused.

(a) The first item of the particulars was dated 12th May, 1841; the last was dated 15th October, 1842. The defendant consented to be president late in May, 1841; the meeting at which he presided was held in April, 1842. The letter to the lord mayor was written, and all the other acts insisted upon done, by the defendant, after May, 1841.

Ex parte JACQUES BESSET. Nov. 5.

Under the convention act, 6 & 7 Vict. c. 75, for committing and delivering up to justice, on requisition by an agent of the king of the French, persons accused of certain crimes done in France, a warrant to detain a party so accused "until he shall be discharged by due course of law" is insufficient; and the party imprisoned under it is entitled to his discharge on habeas corpus. The habeas corpus for that purpose is claimable at common law.

On habeas corpus, and motion to discharge from such imprisonment for an offence committed abroad, the warrant being defective, the court (assuming that they could look into the depositions referred to by the warrant) cannot on their own authority remand the prisoner as a person charged with a crime.

M. CHAMBERS, in this term, (November 2d,) moved for a habeas corpus directed to the jailer or keeper of her majesty's jail or prison in Giltspur street, in the city of London, or his deputy, commanding him to have before the queen at Westminster, immediately, &c., the body of Jacques Besset, being detained under the custody of the said jailer, with the day and cause of his being taken and detained, &c., to undergo and receive, &c. The court granted the writ: and the keeper now brought the prisoner into court, and made return:

"That, before the said writ came to me, viz. on the 4th day of November, 1844, the said Jacques Besset was committed to my custody by virtue of a certain order or commitment (b) the tenor whereof followeth; viz.

"To all and every the constables and other officers of the peace for the city of London and the liberties thereof, whom these may concern, and to the keeper of the Giltspur street prison, in London.

"London, } These are in her majesty's name to command you and every of
to wit: } you forthwith safely to convey and deliver into the custody of the said keeper, the body of Jacques Besset, being charged [*482]

(b) See stat. 6 & 7 Vict. c. 75, sects. 1, 3.

before me, one of her majesty's justices of the peace in and for the said city and liberties, by the oaths of Philip Antoine Mathieu and others, taken and sworn in the presence and hearing of the said Jacques Besset, for that the said Jacques Besset is accused of having committed in France the crime of fraudulent bankruptcy, as appears by the warrant of arrest issued by a competent judge in France, and duly authenticated before me, and as also appears by the warrant of one of her majesty's principal secretaries of state requiring me to take cognisance of such crime, the said crime and the acts done being clearly set forth and proved before me by the oaths of the said Philip Antoine Mathieu and others, and by the depositions of several witnesses, taken in France, and duly proved by the said Philip Antoine Mathieu and others: whom you the said keeper are hereby required to receive, and him in your custody safely keep until he shall be discharged by due course of law. And for your so doing this shall be to you and each of you a sufficient warrant. Given under my hand and seal this 23d day of September, 1844.

WM. MAGNAY,

"Mayor of London."

"And this is the cause," &c.

The return having been read,

M. Chambers moved that the prisoner should be discharged.

E. James opposed the discharge. First, it is proposed to show by affidavit that the party is a foreigner, and *the circumstances under *483] which he stands charged with crime. Such affidavits, being merely explanatory, and not contradictory to the return, may be received. [Lord DENMAN, C. J. The convention act, 6 & 7 Vict. c. 75, under which the prisoner is committed, enacts (sect. 1) that, "in case requisition be duly made, pursuant to the said convention, in the name of his majesty the king of the French, by his ambassador," &c., "to deliver up to justice any person who, being accused of having committed" one of certain specified crimes within the French territories, shall be found within her majesty's dominions, it shall be lawful for one of her majesty's secretaries of state, by his warrant to signify such requisition, and require all justices, &c., to aid in apprehending such person, and committing him to jail for the purpose of his being delivered up to justice according to the convention, and thereupon it shall be lawful for any justice, &c., to examine into the charge on oath, and, upon such evidence as would justify committing for trial if the crime of which the party is accused were committed here, "to issue his warrant for the apprehension of such person, and also to commit the person so accused to jail, there to remain until delivered pursuant to such requisition as aforesaid." Here the commitment is "until he shall be discharged by due course of law." How do you get over that objection?] In the first place the prisoner is not in a situation entitling him to the benefit of it. The court will look at the depositions, and, if they see that the party is detained on charge of a crime for which he may be tried in another country, they will remand him to custody. [COLERIDGE, J. On what law or statute do

you consider the prisoner's application to be founded?] It appears to be under *stat. 31 Car. 2, c. 2. The object of that act is that parties charged with "criminal or supposed criminal matters" shall not be [484 detained in prison for offences which may be tried in this country. The provision in sect. 3, that surety shall be taken for the party's appearance in the Court of King's Bench, or at the next assizes or sessions, agrees with this construction. Stat. 56 G. 3, c. 100, is only an extension of the former act, and does not require any different interpretation. And in *Rex v. Mackintosh*, 1 Stra. 308, it was held that the statute of Charles did not apply to a person committed for treason done in Scotland. [Lord DENMAN, C. J. Why may not we consider the writ as issued at common law?] If the court will not act under the statute in the case of a person charged with a crime done abroad, neither will it interfere in such a case at common law. [Lord DENMAN, C. J. According to your argument, our jailers are jailers for France without the convention.] If the writ lies, the objection pointed out is not fatal to the warrant. "Discharged by due course of law" means discharged by the course pointed out in the statute, namely, by being delivered up as the enactment requires. In *Ex parte Goff*, 3 M. & S. 203, a warrant concluding in this form was held, on habeas corpus, sufficiently certain. It is true that the warrant there (by which a collector was committed for not accounting, under stat. 25 G. 3, c. 41,) recited an adjudication that the party should be committed until he should have made a true and fair account, and paid over the moneys remaining in his hands; but here, if reference be made to the convention act, the course by which the prisoner is to be discharged becomes equally certain. *[WIGHTMAN, J. Suppose no requisition is made under sect. 3 of stat. 6 & 7 Vict. c. 75, for an [485 order to deliver the party up to an agent of the king of the French.] At the end of two months he will be discharged, under sect. 4. In *Mash's Case*, 2 W. Bl. 805, a warrant concluding "until he shall be discharged from thence by due course of law" was held insufficient; but there the things required for the discharge were acts to be done by the prisoner himself. [WIGHTMAN, J. The present case is within the terms of the judgment there; that, where a man is committed for any crime, at common law or by statute, for which he is punishable by indictment, "he is to be committed, till discharged by due course of law: but, when it is in pursuance of a special authority, the terms of the commitment must be special, and exactly pursue that authority."] Supposing the return here defective, it will be a question whether the court will not look into the depositions on which the warrant was granted, and, if they show a crime committed, remand the prisoner. [WIGHTMAN, J. That could be only where a crime appeared for which trial might be in this country. Lord DENMAN, C. J. The depositions are nothing to us, unless under the statute. COLERIDGE, J. Does the statute give any power of this kind to us?] It does not limit the general authority of the court.

Sir *F. Thesiger*, solicitor-general, with whom was *Gurney*, appeared on behalf of the lord mayor, but only to abide such order as the court should make.

M. Chambers, for the prisoner, was not further heard.

*486] *Lord DENMAN, C. J. I regret that, on the first application which has come before us under this statute, the warrant is so defective that we cannot allow the act to take effect. Neither we nor the jailer have any power but such as the statute gives; and its provisions have not been rightly pursued. We are asked to remand the prisoner on our own authority, as charged with a crime: but we know nothing of the crime unless as it is brought before us by the warrant; or, I should rather say, we have no authority of the kind in such a case. If we could act in the manner suggested, the statute would have been unnecessary. The prisoner must be discharged.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Lord DENMAN, C. J. It is proper that it should be understood that this application is at common law. The statute, 31 Car. 2, c. 2, is not necessary to the right of making it.

Prisoner discharged.

COLLIER v. CLARKE. Nov. 6.

Reported, 5 Q. B. 467.

*487] *WHITE v. HILL and Others. Nov. 7.

Where the lord of a manor has conveyed land to A., and afterwards other land to B., and it appears that a narrow strip of land passed by one or other of the conveyances, but it is doubtful by which, no presumption arises in favour of A. from the fact that the strip of land lies between a highway and land undisputedly comprised in the conveyance to A.

Where several defendants to an action of trespass plead Not guilty, with other pleas, and the plaintiff gives no evidence as against one of them, such defendant is not entitled, as of right, to claim his acquittal before the case for the defence is opened. And per Lord Denman, C. J., the more ordinary practice is not to direct an acquittal till the case on both sides is closed.

TRESPASS. The first count charged that defendants, to wit on, &c., with force, &c., broke and entered a close of plaintiff, situate, &c., (setting out abutments north, south, east, and west;) and, with feet in walking, &c. The second count charged that defendants, on, &c., with force, &c., broke and entered another close of plaintiff, situate, &c., (setting out the same abutments, with the omission of the abutment on the east;) and then and there cut down the trees, to wit three elm trees, of plaintiff, of great value, &c., then growing and being in and upon the last mentioned close, and also a certain other tree of plaintiff, of great value, &c., there growing, &c., (as before.) The third count charged that defendants, to wit on, &c., seized, took and carried away divers, to wit twelve, wagon loads of wood, ten wagon loads of

loads of bushes, and four trees, of plaintiff, of great
valued, &c.

the close in which, &c., was not the close of

close in which, &c., and the trees, and
mentioned, were not the close and

, timber, bushes, and trees, were not
plaintiff.

the close in that count mentioned,

at time when, &c., were the close, soil [*488

by Hill and one William Harrison : justification by

, and by the command of the said Hill and Harrison.

and count, that the other tree in that count mentioned was,

men, &c., in that count mentioned, standing, growing, and

the said close in which, &c., in that count mentioned, and that, at

time when, &c., the said close in that count mentioned was the

soil and freehold of J. Hill and W. Harrison ; justification as before.

Replication. To the first, second, third, and fourth pleas, similiter. To
the fifth plea, that the close in the first count mentioned was not the close
of J. Hill and W. Harrison. To the sixth plea, that the close in the second
count mentioned was not the close of J. Hill and W. Harrison.

Rejoinder. Similiter to the replications to the fifth and sixth pleas.

On the trial, before PATTESON, J., at the last Hampshire assizes, it
appeared that the plaintiff was in the occupation of certain land in the Isle
of Wight, near to certain other land, of which J. Hill and W. Harrison
were the legal owners. In 1723, the whole of the land above mentioned
had been in the ownership of a person named Popham, who was lord of a
manor comprehending all. In that year, Popham demised certain part of
it for a term of years ; and it was shown that the land so demised had now,
by renewals and assignments, come to the legal ownership of J. Hill and
W. Harrison. In 1727, Popham demised other parts of his land
for a term of years ; and this, by renewals and assignments, had [*489
now come to the legal ownership of the plaintiff. The question between
the parties was as to the ownership of a strip of waste land, six or seven
yards in breadth, lying between the land of Hill and Harrison and a high
road. It was admitted to have passed by one or other of the demises
mentioned : the plaintiff contended that it was comprised in the demise of
1727 ; the defendants, that it was comprised in that of 1723. Neither the
names, nor admeasurements, nor other description of the parcels in the two
demises afforded the means of ascertaining in which demise the strip was
comprehended : but evidence of acts of ownership was given on both sides,
and, for the defendants, it was further contended that a presumption, more
or less strong, must be made in favour of the defendants, from the circum-

stance that, at the time of the demise in 1723, Popham, the owner of the land then demised, was owner of the strip of land in question, and would therefore most probably have demised the whole up to the road. The learned judge told the jury that such a presumption would be proper if the question were between the lord of the manor and the owner of the freehold of the demised property; but that no such presumption could be made in a dispute between two parties both claiming by demises under the same owner of the freehold. Evidence was also given by the plaintiff that all the defendants, except the defendant Hill, had joined in cutting down a tree, and, in doing so, had gone over the strip of land in question; but it appeared doubtful whether the tree stood within the strip. At the close of the plaintiff's case, no evidence having been given to implicate the defendant Hill, the counsel *for the defendants claimed an acquittal for *490] him before opening the case for the defence: but the learned judge refused so to direct: and evidence connecting the defendant Hill with the acts done came out in the course of the case for the defendants. The jury were of opinion that he had taken a part in the trespass, that the strip of land in question belonged to the plaintiff, and that the tree stood within the land belonging to the defendants, but that, in going to cut down the tree, the defendants had trespassed on the strip of land. Verdict, on the issue on the first plea, for the plaintiff: on the issue on the second plea, for the plaintiff: on the issue on the third plea, for the plaintiff as to all but the trees, and, as to them, for the defendants: on the issue on the fourth plea, for the defendants: on the issue on the fifth plea, for the plaintiff: on the issue on the sixth plea, for the plaintiff.

Cockburn, for the defendants, now moved for a new trial. First, the learned judge misdirected the jury in telling them that no presumption could arise as to the strip of waste land having been included in the demise of 1723. The question is not as to the weight of the presumption, but whether such presumption was to be altogether excluded from the consideration of the jury. It would undoubtedly have arisen against the owner of the manor: *Doe dem. Pring v. Pearsey*, 7 B. & C. 304. It cannot be destroyed by the lord afterwards making a second grant: whatever was evidence against the lord would be evidence against his grantee. [PATERSON, J. I cannot see any ground for the presumption in your case. The *way in which such a presumption is said to arise is, that the road *491] has been granted by the owners of the adjoining land, and that their ownership therefore extends up to the middle of the road; but how can that argument apply when the whole has belonged to one person, who has granted a part to one grantee and a part to another? Lord DENMAN, C. J. I always thought that presumptions of this nature were put too widely.](a)

Next, Hill was entitled to his acquittal at the close of the plaintiff's case. In *Child v. Chamberlain*, 1 Moo. & Rob. 318, PARKE, J., said, "It is now perfectly settled by the unanimous decision of all the judges, that when at

(a) See *Re v. Hatfield*, 4 A. & E. 156, 164.

the close of the plaintiff's case there is no evidence against a particular defendant, that defendant is then entitled to an acquittal. In consequence of the discrepancy of practice of different judges, the matter was brought before them all, and they have determined on that rule." In *Hawkesworth v. Showler*, 12 M. & W. 45, 48, Lord ABINGER stated that the rule acted upon by the judges was "that a defendant in trespass shall not be acquitted for the purpose of giving evidence, till the evidence on the part of the plaintiff has been concluded;" thus assuming that, at that step, the acquittal should be taken. [Lord DENMAN, C. J. In *Sowell v. Champion*, 6 A. & E. 407, 415, we held that this was discretionary with the judge; and the more usual practice certainly is to let the whole case go on. Where one party is acquitted, he might be called for the defence, and prove that he, and not any of the other defendants, was the real wrong-doer. I know of no meeting of the judges at which any such resolution has been come to as that spoken of in *Child v. Chamberlain*, 1 Moo. & Rob. 318. [*492]

Per Curiam.(a)

Rule refused.

(a) Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

DOE on the demise of ROBINSON v. BOUSFIELD. Nov. 7

Tenant of copyhold demised to A. from year to year, and, pending such demise, made a lease of the reversion for twelve years to B., contrary to the custom of the manor, by which no tenant might demise without license for more than three years. In ejectment by B. against the yearly tenant whose term had expired, *Held*, that defendant could not allege the invalidity of the twelve years' lease:

For a lease made contrary to custom is good against all but the lord; and, even as between parties to the lease and the lord, the demise against custom is only a ground of forfeiture, which the lord may waive.

EJECTMENT for lands in Westmoreland. On the trial, before POLLOCK, C. B., at the last Summer assizes at Appleby, the plaintiff had a verdict.

Knowles now moved,(b) by leave reserved at the trial, for a rule to show cause why a nonsuit should not be entered. The facts and ground of motion will appear sufficiently by the judgment of the court, which was delivered in this term, (November 25th,) by

LORD DENMAN, C. J. In this case, tried before the lord chief baron, at Appleby, Mr. *Knowles*, by leave, moved to enter a nonsuit. The lessor of the plaintiff claimed under a lease for twelve years, granted by Scott, a copyholder of the manor of Brough. By the custom of the manor, the tenants may demise, without license, for three years and no more. The defendant had been tenant from year to year, of Scott, and [*493] was holding over after notice to quit.

It was objected that the lease for twelve years, being not warranted by the custom, was void, and conferred no title on the lessor of the plaintiff: for

(b) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

which *Jackson v. Neal*, Cro. Eliz. 394, was cited, in which it was held that a lease by a copyholder who had obtained a *license*, and made a lease not warranted by it, was void, and the lessee could not maintain ejectiones *firmæ* against a stranger. In the same volume, however, in *Haddon v. Arrowsmith*, Cro. Eliz. 461, S. C. Owen, 72, it is said by counsel in argument that it hath been here adjudged that lessee for years of a copyhold, which is made without license of the lord, may maintain an ejectiones *firmæ*, *because he is lessee, against all but the lord*. And there GAWDY, J., said that a lease not warranted by the license was good betwixt the lessor and lessee, and *against all strangers.*(a) And, even as against the lord, a lease not warranted by the custom may become good; for it was held in *The Lady Montague's Case*, Cro. Jac. 301, that "if a copyholder makes a lease of his copyhold land contrary to the custom; and the lord of the manor dies before his entry or seizure for the forfeiture; that he or they in reversion or remainder shall never take advantage of the forfeiture done or committed before his or their time." The same law will be found in *Eastcourt v. Weeks*, 1 Salk. 186.

*494] These cases are important as establishing that a lease beyond the custom is not void, but only a ground of forfeiture, which may be waived by the lord, and which the reversioner even cannot avail himself of, much less a mere stranger. There is no ground, therefore, for the present application: and we do not wish to encourage a doubt upon the matter by granting a rule. There will be no rule. Rule refused.

(a) Knowles, in moving, adverted to a suggestion made by the lord chief baron at the trial, that the lease, though bad for twelve years, might take effect for three. In answer to this, Knowles referred to Com. Dig. *Copyhold*, (K 3,) and *Haddon v. Arrowsmith*, Owen, 72, there cited.

DALLY v. POOLLY. Nov. 8.

An agreement by plaintiff, (an attorney,) defendant and B. set forth that, "in consideration" of B. having agreed to pay to defendant his claim against B., and certain costs out of the proceeds to arise from the recovery by B. in an action of B. against J., defendant undertook to pay plaintiff all costs incurred by him in prosecuting the action of B. against J., plaintiff thereby agreeing with defendant to bring the same.

Held that, in assumpsit on this agreement, the consideration was rightly described to be the plaintiff, at the request of defendant, would, with B.'s assent, prosecute the action of B. against J.

ASSUMPSIT. The declaration charged that, whereas one James Belton, before and at the time of the making of the promise of defendant after next mentioned, was indebted to defendant in a certain sum, to wit 100*l.*, and defendant had before then commenced an action of debt in the Exchequer against Belton for the recovery of the said sum; and whereas also one Edward Jarrett was, before then, indebted to Belton in a certain other sum of money, to wit, 500*l.*; and whereas, also, before and at the time of the making of the promise of defendant next after mentioned, to wit, 8th December, 1841, it was proposed by and between Belton and defendant that

Belton should commence an action against Jarrett for the recovery of the money so due from Jarrett to Belton, and that Belton, out of the proceeds to arise by recovery of the amount of claim against Jarrett in the said last mentioned action, should pay to defendant *the said sum so due and owing from Belton to defendant, and costs as between attorney and client in the said action so brought by defendant against Belton ; and whereas also plaintiff, before and at the time of the making of the promise of defendant next after mentioned, was and still is an attorney of the Court of Queen's Bench ; and thereupon heretofore, and before the commencement of this suit, to wit on, &c., in consideration that plaintiff, at the request of defendant, would, with the assent of Belton, commence and prosecute the said action at the suit of Belton against Jarrett as aforesaid for the recovery of the sum so due from Jarrett to Belton, defendant then promised plaintiff to pay him all such costs as might be incurred by plaintiff in prosecuting the last mentioned action : averment, that plaintiff, confiding in the promise of defendant, did afterwards, and before the commencement of this suit, to wit on, &c., as such attorney, with the assent of Belton, commence the last mentioned action in the name of Belton against Jarrett, and then, to wit on, &c., and on divers other days and times between that day and the commencement of this suit, prosecuted the same ; and such proceedings were thereupon had in the said last mentioned action that afterwards and before the commencement of this suit, to wit 24th July, 1843, &c. : the declaration then averred submission of all matters in difference to a barrister, who made his award, to wit 21st August, 1843, setting aside a verdict entered for the plaintiff in that action, and ordering a verdict to be entered for the defendant therein, and directing 37*l.* to be paid by Jarrett to Belton in a month from the date of the award, and that each party should pay his own costs, and the costs of reference and award be *borne equally by the parties : that the last mentioned action, heretofore and before the commencement of this suit, to wit on, &c., was wholly ended and determined ; that plaintiff, as such attorney as aforesaid, to wit on, &c., incurred, and defendant then, to wit on, &c., according to the tenor and effect of his said promise, became liable to pay to plaintiff, a certain large sum, to wit 100*l.*, for costs in prosecuting the said last mentioned action, upon request : of all which, &c., (notice to Belton and defendant :) and Belton had not, although he and defendant were afterwards, to wit on, &c., requested by plaintiff so to do, paid the said sum of 100*l.* or any part thereof, whereof defendant then had due notice : yet defendant, not regarding, &c., had not, though often requested, paid plaintiff the last mentioned sum of 100*l.*, or any part thereof ; and the said 100*l.* still remains due, &c. (There were other counts not here material.)

Plea. Non assumpsit. Issue thereon. (There were other issues, not material here.) On the trial, before WIGHTMAN, J., at the Middlesex sittings after last term, the plaintiff proved the execution of the following agreement between Belton, defendant, and plaintiff.

"Maidstone, 8th December, 1841.

"Belton v. Jarrett.

"In consideration of Mr. James Belton's having agreed to pay to Mr Poolly the amount of the latter's claim against him, and costs as between attorney and client in an action now pending between them, out of the proceeds to arise by the recovery of the amount of Belton's claim in this action, (which Belton admits by signing this memorandum,) the said Mr. Poolly hereby undertakes to pay to Mr. Dally all such costs as may be incurred by *him in prosecuting this action against Jarrett, Mr.
*497] Dally hereby undertaking with Poolly to bring the same.

"Witness," &c.

"JAMES BELTON,
"JOSEPH POOLLY,
"F. F. DALLY."

The counsel for the defendant claimed a nonsuit, on the ground that this agreement did not support the declaration. The learned judge directed a verdict for the plaintiff, giving leave to move for a nonsuit.

Platt now moved accordingly. (a) The agreement proved is on a different consideration from that described in the declaration. The declaration alleges the consideration to be the prosecution by the plaintiff of Belton's action against Jarrett: the consideration in the agreement is another agreement of Belton with the defendant. No action at all would have lain against the plaintiff on this consideration.
Cur. adv. vult.

Lord DENMAN, C. J., in this term, (November 25,) delivered the judgment of the court.

The only question in this case was whether the consideration for the promise stated in the declaration agreed in substance with the consideration stated in the agreement which was the foundation of the action. And we think it did. Several matters explanatory of the agreement are stated in the commencement; and the term "in consideration" is used to introduce them; but these do not form any part of the consideration for the defendant's *promise to pay the plaintiff, which depended solely on the
*498] plaintiff's undertaking to carry on an action at the suit of Belton, and carrying it on accordingly. They relate to an agreement previously entered into between the defendant and a third person, in which the plaintiff had taken no part, and only explain the circumstances under which the plaintiff and defendant in this action entered into the agreement now sued on. We therefore think that in this case there should be no rule.

Rule refused.

(a) Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Ja.

CASTRIQUE v. BERNABO. Nov. 9.

In an action against endorser of a bill of exchange, issue was joined as to notice of dishonour. It appeared that a letter containing the notice was put into the post on the day on which the action was commenced, and, by the routine of the post-office, would reach the defendant between four and five in the afternoon of that day. No further evidence was given as to the time of notice. The offices of the court were open only till five in the afternoon of the day in question.

Held, that the plaintiff must fail, it lying on him to show that the right of action was complete before the suit was commenced.

DECLARATION in debt, on a writ issued 25th May, 1844, by endorsee of a bill of exchange, drawn 20th January, 1844, at four months, against the endorser, averring acceptance by the drawee, non-payment by him at maturity, and that the bill was then protested, of which defendant then had due notice.

Plea, that defendant had not due notice of non-payment. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the London sittings after last Trinity term, the plaintiff proved that a letter to defendant, containing notice of dishonour, was put into a receiving house in the city of London, between two and three in the afternoon of the 25th of May, the day on which the action was commenced. The defendant resided in Oxford street, London. For the defendant evidence was given of the "routine of the post-office as it existed some years ago; from which it appeared that at the time referred to by that evidence, a letter so put into a receiving house in the city would not be delivered in Oxford street before six o'clock in the same evening. It appeared, further, that the offices of the court were open on the 25th of May till five o'clock only. On this evidence it was contended that no right of action had existed at the time when the suit was commenced. It was however suggested, on the part of the defendant, that an alteration had recently been made in the post-office arrangements, by which the delivery was accelerated. The lord chief justice, with the consent of the parties, directed that evidence of this should be procured, that the plaintiff should be nonsuited, but that leave should be given to move for a verdict for the plaintiff if the evidence should justify it. Another cause was then called on: and, in the course of the day, evidence was given that, according to the routine of the post-office on 25th May, the letter would reach Oxford street between four and five in the afternoon. [499

Willes now moved to enter a verdict for the plaintiff, according to the leave reserved. The evidence showed the possibility of the writ being issued at a time later than that at which the notice would arrive. Which occurrence took place first, does not directly appear. But the presumption of law is that, where two acts appear to have been done, and it is not shown in what order they have been done, that order is to be assumed which will make the whole regular. The action was maintainable instantly after the

*500] notice was received; **Siggers v. Lewis*, 1 C. M. & R. 370, S. C. 4 Tyrwh. 847. In *Aikman v. Conway*, 3 M. & W. 71, it was holden that, if two acts be done in the same day, the court will not inquire which was done first, but will presume that they were done in the regular order. The declaration shows a notice before action brought; if such notice had not been given, the defendant might have pleaded in abatement: Com. Dig. *Abatement*, (G 6.)

LORD DENMAN, C. J. The rule of law is that, where there is a doubt which of two occurrences took place first, the party who is to act upon the assumption that they took place in a particular order is to make the inquiry. That is founded on reason. An opposite rule would justify a party in suing where he had not ascertained his right. It follows that the plaintiff, in this case, has taken upon himself to show that a right of action existed before he commenced his suit: and, not having done this, he must fail.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Rule refused.

*501] *The QUEEN v. CHARLES ARTHUR HILL HEATON
ELLIS. Nov. 9.

Stat. 9 G. 4, c. 40, s. 38, (a) empowered justices, by order, to remove lunatic paupers to the county lunatic asylum established under that or any other act; "and if no such county lunatic asylum shall have been established," then to some public hospital or house licensed for the reception of insane persons.

Held, that justices, under this clause, could not remove to a licensed house, in a county for which a county asylum was established, but which asylum was too full to receive the pauper. Though it was assumed that the case, if not within s. 38, was unprovided for by the act.

On appeal, in which the churchwardens and overseers of St. Luke's, Middlesex, were appellants, and C. A. H. H. Ellis, Esq., clerk of the peace of the said county, respondent, against an order of John Tidd Pratt, Esq., and John Johnson, Esq., two of her majesty's justices of the peace in and for the said county, bearing date December 12th, 1843, whereby the overseers of the poor of St. Margaret's, Westminster, were ordered to cause Harriet Ellis, an insane person, to be conveyed to a house duly licensed for the reception of insane persons in the county of Surrey, it appearing to the said two justices that there was not room or accommodation for the said Harriet Ellis in the county lunatic asylum established at Hanwell in the county of Middlesex: and against a certain other order bearing date the said 12th day of December, A. D. 1843, under the hands and seals of the same two justices, whereby the said justices did adjudge the settlement of the said Harriet Ellis to be in the parish of St. Luke, in the county of Middlesex, and did order the overseers of the poor of the said parish of St. Luke to pay the sum of 6s. 6d., being the amount of the reasonable charges of conveying the said Harriet Ellis to the said licensed house: and also to

(a) See now stat. 8 & 9 Vict. c. 126, ss. 48, 49.

pay to Peter Armstrong, the keeper of the said licensed house, *the sum of 10s. per week, which payment the said Peter Armstrong [*502 was willing to accept, and the same appeared to the said two justices to be a reasonable charge for the maintenance, medicine, clothing and care of the said H. Ellis whilst confined therein: the sessions quashed the several orders, subject to the opinion of this court upon the following case.

At the time when the orders in question were applied for and made, there was a county lunatic asylum at Hanwell in and for the county of Middlesex; which asylum then contained upwards of nine hundred patients, and was then quite full. When that asylum was first completed under the provisions of stat. 9 G. 4, c. 40, it was capable of containing three hundred patients only. It was afterwards enlarged and altered from time to time, until it became capable of containing upwards of nine hundred patients: but it was proved before the justices who made the orders appealed against that there was no room or accommodation for the said Harriet Ellis in the said county lunatic asylum when the said orders were made. The above facts were admitted on both sides when the appeal came on to be heard. The appellants insisted that, since in fact there was a county lunatic asylum in Middlesex, the justices had no jurisdiction, under stat. 9 G. 4, c. 40, s. 38, to direct such insane pauper's removal to a house duly licensed for the reception of insane persons: and that, at any rate, the justices had no jurisdiction to remove the pauper to a house out of the county of Middlesex, within which county there were many houses duly licensed for the reception of insane persons and to which the pauper might have been sent. The court of quarter sessions, on the objections so taken, quashed the orders, subject to the opinion of this court.

"If this court shall be of opinion that the orders were, under these [*503 circumstances, legally made, then the said orders of justices were to stand affirmed and the order of sessions to be quashed; otherwise the orders of justices to be quashed and the order of sessions affirmed.

Prendergast, in support of the order of sessions. The order for removal to the licensed house was made under the supposed authority of stat. 9 G. 4, c. 40, s. 38, which enacts that, where a poor person chargeable to any parish is deemed to be insane, and is brought before two justices in the manner there pointed out, such justices, if satisfied of the insanity upon view and examination of the pauper, or from other proof, shall inquire into the place of settlement; "and it shall be lawful for them, if they shall so think fit, by an order," &c., "to cause the said poor person to be conveyed to and placed in the county lunatic asylum established under the directions of this or any former act, for the county, or district of united counties, for which or any of which they shall act, and if no such county lunatic asylum shall have been established, then to some public hospital or some house duly licensed for the reception of insane persons;" and the same or two other justices may make order on the overseer of the place of settlement for payment of charges. This enactment provides for two cases; where there is

a county lunatic asylum, and where "no such county lunatic asylum shall have been established;" in which latter case only the justices may order removal to a public hospital or licensed house. The justices cannot, because it appears expedient, exercise the same authority in a third state of things not provided for *by the act, namely when an asylum exists but is *504] full. *Rex v. Chagford*, 4 B. & Ald. 235, is an analogous case. The justices here might perhaps have made an order for removal to the asylum, and suspended it; but they could not make one contrary to the statute. If it is asked what course can be taken in a case of emergency like the present, the answer may be that the lunatic must go to the parish workhouse, like other paupers, the legislature having made no special provision. Another objection is that two justices of Middlesex make an order for removal to an asylum in Surrey. (The further argument on this point is omitted, the decision not having turned upon it.)

Bodkin and *Pashley* contra. This is a case in which the justices must have a discretion for the purpose of giving effect to the statute, which was passed, as the title states, "more effectually to provide for the care and maintenance of pauper and criminal lunatics." The legislature must have meant that these should in every case be provided for somewhere. Statutes are not to be expounded according to strict propriety of construction, or even in the usual grammatical sense, if that mode of interpreting would lead to manifest inconvenience, and be inconsistent with the subject and occasion, and the object contemplated by the legislature; *Rex v. Hall*, 1 B. & C. 123, 136, per ABBOTT, C. J.; *Edmonds v. Lawley*, 6 M. & W. 285, 289. In sect 44 of stat. 9 G. 4, c. 40, which applies to the urgent case of lunatics wandering abroad and dangerous, the same course of proceeding is directed as under sect. 38; but there the object of the statute would be defeated if the *construction on the other side were cor- *505] rect. It has been suggested that the pauper may at all events be taken to the parish workhouse; but stat. 4 & 5 W. 4, c. 76, s. 45, provides that nothing in that act shall authorize the detention in any workhouse of any dangerous lunatic, insane person or idiot, for any longer period than fourteen days, and makes the further detention punishable as a misdemeanor. The words "if no such county lunatic asylum shall have been established," in sects. 38 and 41, must extend to the case where an asylum has been established but has been rendered useless for the purpose contemplated: as, for instance, by fire. [COLERIDGE, J. Suppose the keeper of the licensed house will not receive the pauper.] That difficulty does not arise here: the willingness is recited in the order. No doubt that must be a condition precedent; but the legislature probably assumed that, on payment (which the act provides for) of a reasonable sum for expenses, the keeper of such a house always would be willing. The ground of decision in *Rex v. Chagford*, 4 B. & Ald. 235, as appears by the judgment of HOLROYD, J was that the words of the statute were too particular to admit of being extended by construction: that is not the case here.

LORD DENMAN, C. J. I think the sessions were right in quashing these orders. The legislature has not given the power which the justices assumed in granting them. If we upheld them, we should not be construing a statute but making a new enactment. The statute authorizes removal to a licensed house "if no such county lunatic asylum shall have been established."

*Here an asylum has been established: the words therefore do not apply. The affirmative words, "it shall be lawful for them" "to [506 cause the said poor person to be conveyed to and placed in the county lunatic asylum, established under" this act, are equally free from difficulty. It probably was not supposed, when the act was framed, that, in this country, a place which had once been a lunatic asylum would cease to be so. As to the difficulty in a case like this, if there is, in effect, no asylum, the justices must make such order at the expense of the parish as they might if the act had not passed.

WILLIAMS, J. Supposing that an asylum which is full is the same for the present purpose as none, still the case is one not introduced into this act; though we may surmise that, if such a case had been contemplated, some provision for it would have been inserted.

COLERIDGE, J. This act created new powers in order to get rid of the miserable care to which pauper lunatics were before subjected, and which, in small parishes, was an important nuisance. Two cases are specified: if a county asylum has been established, it is intended that all the pauper lunatics shall go to it: if none has been established, recourse is to be had to a public hospital or licensed house: but the inflexible rule attaches, that, under a special power, parties must act strictly on the conditions under which it is given. Here an asylum had been established: therefore the power given where none has been established could not be exercised.

WIGHTMAN, J., concurred.

Order of sessions confirmed.

*507] *The QUEEN v. The Inhabitants of CASTERTON. Nov. 3.

An order of sessions, confirming an order of removal, had in the margin the words "Westmoreland, (to wit,)" and proceeded: "To the overseers of the poor of the township of K., and to the overseers of the poor of the township of C., in the said county. Whereas you, the overseers of K., have made complaint unto us whose names are hereunto set and seals affixed, being two of her majesty's justices of the peace and quorum in and for the said county," &c. The rest of the order was in the usual form, and did not further state the county in and for which the justices acted.

Held, that the jurisdiction sufficiently appeared by reference to the margin, which was part of the order for this purpose.

An order of sessions on appeal against the above order, after setting forth the caption of the quarter sessions, proceeded: "At which said general quarter session," &c., "an appeal against a certain order," &c., "is depending for trial, which said order is" "as follows," (setting it out:) "and whereas the overseers," &c., "of C. did prosecute and carry on the said appeal to trial against the said order to the present general quarter sessions of the peace, and wherein this court upon hearing of counsel on both sides ordered that the said order be confirmed."

Held, on certiorari and motion to quash, that the order of sessions sufficiently showed an adjudication confirming the order of removal.

PASHLEY, in last Trinity term, obtained a rule to show cause why the following order of the Westmoreland Quarter Sessions, (brought up by certiorari,) should not be quashed for insufficiency.

"Westmoreland, (to wit.) Be it remembered that, at the general quarter sessions," &c., "holden at Appleby, in and for the county of Westmoreland, on," &c., "before," &c., "that same session of the peace is adjourned," &c., (stating an adjournment to Kendal, in the county aforesaid:) "and, on," &c., "the same general quarter session of the peace is holden by the adjournment aforesaid, at Kendal aforesaid, in and for the said county, before," &c.: "at which said general quarter session of the peace, continued and holden," &c., on, &c., before, &c., "an appeal against a certain order, bearing date the 28th day of October, A. D. 1843, under the hands and seals of John Wakefield, Esq., and Richard Fothergill, Esq., is then and there depending for trial, which said order is annexed to this schedule, and is in manner and form as follows. 'Westmoreland, (to wit.)

*508] To the overseers of the poor *of the township of Kirkby Lonsdale, and to the overseers of the poor of the township of Casterton, in the said county. Whereas you, the overseers of the poor of the township of Kirkby Lonsdale, have made complaint unto us whose names are hereunto set and seals affixed, being two of her majesty's justices of the peace and quorum in and for the said county, that James Dixon has come to inhabit in your said township, not having gained a legal settlement there, nor having produced a certificate," &c., "and that the said J. D. has been actually chargeable to your said township: We, the said justices, upon due proof made thereof upon oath, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge that the lawful settlement of the said J. D. is in the parish, township or place of Casterton, in the county of Westmoreland: we do, therefore, require you the said overseers of the poor of the said township of Kirkby

Lonsdale, or some or one of you, to convey the said J. D. from and out of your said township of K. L. to the said parish, township, or place of Casterton, and him, together with this our order or a true copy thereof, to deliver to the overseers of the poor there, or to some or one of them, who are also hereby required to receive and provide for him according to law. Given under our hands and seals, the 28th day of October, A. D. 1843.

‘JOHN WAKEFIELD, L. S.’

‘RICHARD FOTHERGILL, L. S.’

“And whereas the overseers of the poor of the township of Casterton, did prosecute and carry on the said appeal to trial against the said order to the present general quarter sessions of the peace, and wherein this *court, upon hearing of counsel on both sides, ordered that the [*509 said order be confirmed. By the court, &c.”

Baines and *Ramshay* now showed cause. The first objection taken is, that the order of removal does not sufficiently appear to have been made by two justices of Westmoreland. The order of sessions, indeed, does not aver that fact; but it recites the order of removal; and there Westmoreland is named in the margin, and the magistrates are stated to be justices “in and for the said county,” no other being named. *Rex v. Moor Critchell*, 2 East, 66, may be mentioned on the other side, but is overruled by *Rex v. St. Mary's, Leicester*, 1 B. & Ald. 327; so, in effect, is *Rex v. Chilverscoton*, 8 T. R. 178, which may also be cited. The margin is part of the order, and a plain reference to it sufficient; *Rex v. Holbeck*, Burr. S. C. 198, 200; *Rex v. Bourn*, Burr. S. C. 39, 43; *Rex v. Southwold*, Burr. S. C. 140, 144. A reference from the body to the margin of an indenture, appearing by reasonable construction, was held sufficient in *Rex v. Countesthorpe*, 2 B. & Ad. 487. In *Rex v. St. Mary's, Leicester*, HOLROYD, J., goes so far as to say that, where two counties are named, “the court will intend that the words ‘said county’ have reference to the county where the magistrates had jurisdiction; for that construction which supports, and not that which destroys the instrument, may fairly be adopted.” It is objected, secondly, that the conclusion of the order of sessions is in its form recital only, not adjudication. But no precise form is necessary; and the meaning sufficiently appears. An adjudication in the form of a recital was [*510 *held good in *Rex v. Mulden*, 8 B. & C. 78. If the word “wherein” in this order be taken to mean “therein,” the sense is plain.

Pashley, contra. It is not disputed that a reference to the marginal venue is sufficient, if plain: but, if it be not, nothing will be intended to make it good. Intendments may be made where jurisdiction appears, but not to give jurisdiction; *Regina v. Toke*, 8 A. & E. 227. Although *Rex v. St. Mary's, Leicester*, 1 B. & Ald. 327, overrules *Rex v. Moor Critchell*, 2 East, 66, it does not affect *Rex v. Chilverscoton*, 8 T. R. 178, which is an authority against this order. If the order of removal does not show jurisdiction, it cannot be aided by the order of sessions. The jurisdiction must appear by the document itself; *In re Clarke*, 2 Q. B. 619, 624.

2. The words which follow the recited order of removal contain no adjudication. The strictness necessary in this respect appears from *Rex v. Kenworthy*, 1 B. & C. 711, where a judgment in the words "it is ordered," instead of "it is considered," was held insufficient. In *Rex v. Maulden*,^(a) *511] "the words "we" "having adjudged," &c., "do hereby" "require you," &c., might well imply an adjudication. Here the sentence is imperfect, and does not admit of any sensible construction.

Cur. adv. vult.

Lord DENMAN, C. J., in the same term, (November 25th,) delivered the judgment of the court.

The principal question in this case is, whether the justices making the original order of removal appear upon the face of it to have jurisdiction; or, in other words, whether they are stated with sufficient certainty to be justices of and for the county in which the removing township is situate. The order, so far as this point is concerned, is in the following form: "Westmoreland (to wit). To the overseers of the poor of the township of Kirkby Lonsdale and to the overseers of the poor of the township of Casterton in the said county." It then proceeds to state the complaint of the overseers of Kirkby Lonsdale thus: "unto us whose names are hereunto set and seals affixed, being two of her majesty's justices of the peace and quorum in and for the said county." The rest of the order, being in the usual form and not objected to, it is not material to set out. It was contended in argument that, inasmuch as the justices have failed to describe themselves in terms as being justices of and for the county of Westmoreland, their jurisdiction to make the order is not shown, and that, therefore, it cannot be supported. The cases cited were *Rex v. Chilverscoton*, 8 T. R. 178, and *Rex v. Moor Critchell*, 2 East, 66. It was admitted, however, by the learned *512] counsel who argued against the validity of the order, that the latter case can no longer be considered as law. But, be this as it may, we are of opinion that neither of the cases cited is applicable to the present. In the case of *Chilverscoton*, there was no county in the margin of the order; and in the body of it one parish was described as being in one county, and the other in another: and it was upon this circumstance (the mention of two counties) that the want of jurisdiction of the removing justices was made to depend. The court considered that it was left uncertain of which county they were justices. In the case of *Moor Critchell*, the county of *Wills* was in the margin of the order; but in the body of it the

(a) Four other objections were taken. 3. That it did not sufficiently appear by the order of sessions who were appellants and who respondents. 4. That the direction of the order of removal was imperfect, since the words "to the overseers of the poor of the township of Kirkby Lonsdale, and to the overseers of the poor of the township of Casterton in the said county," did not show that Kirkby Lonsdale was "in the said county;" these words being referable to Casterton only. Pashley cited *Baker v. Bacon*, Moore, 754. 5. That the same omission affected the part of the order directing a removal from Kirkby Lonsdale. 6. That the order of removal was not shown by proper words to be made in Westmoreland, the marginal venue not being sufficient for this purpose. *Regina v. F. O'Connor*, 5 Q. B. 16, was referred to. See *Rex v. Holbeck*, Burr. S. C. 196, 201.

county of Dorset was mentioned also ; and the justices described themselves as “justices of the peace in and for the *said county* :” and upon this the court held that it “ought expressly to appear that the justices had jurisdiction to make the order,” and that, “there having been *two counties mentioned* before, they ought to have stated of *which* county they were justices.” It is obvious, therefore, that the order in the present case is free from that uncertainty which, in both the instances referred to, the court considered to be fatal. And the question seems to resolve itself into this, whether the margin is to be considered part of the order or not : because, if it be, the two contending townships are described as being in the county of Westmoreland, (none other being named,) and the removing justices as being justices of that county, by words of direct reference. Now this point seems to have been long settled. The case of *Rex v. Holbeck*, in Leeds, 2 Bott, 692, pl. 864, 6th ed., S. C. Burr. S. C. 198, is thus reported. “It was *objected in this case to the order of removal, that the borough of Leeds is not mentioned in the body of the order, but only in the [513 margin, and therefore it does not appear that the two justices had jurisdiction to make it. LEE, C. J. I take it to be settled, that, in orders, the margin is to be considered as part of the order, and a plain clear reference to it is sufficient.” And the court decided accordingly. We are of opinion that, so construing the present order, it may be sustained, and that the jurisdiction of the justices making the order sufficiently appears.

It was also objected (though to this we believe an answer was given at the time) that the order of sessions is defective, inasmuch as it purports to be in the shape of recital only, and not of direct allegation. We think, however, that the order does *adjudicate*, and that, therefore, this objection also fails.

Upon the whole, therefore, we are of opinion that the rule must be discharged.

· Rule discharged.

*514] *The Corporation of The LONDON Assurance of Houses and
Goods from Fire v. BOLD. Nov. 12.

The condition of a bond given by defendant to plaintiff, after reciting that A. had been appointed agent for plaintiff, which employment he had accepted, and undertaken to perform the trusts thereof, was declared to be that, if A. should, during his continuance in such employment, faithfully demean and conduct himself, and, when required, account for and pay to plaintiff all moneys which he had received or should thereafter receive for plaintiff's use, the bond should be void.

Declaration on the bond set out the condition, and averred that, while A. remained in the employment of plaintiff, as agent aforesaid, A. received for the use of plaintiff moneys, amounting, &c., but did not, when required, account, &c. Plea; that A. did not, while he remained in the service of plaintiff as such agent as in the declaration mentioned, receive for the use of plaintiff the sums mentioned.

Held, that plaintiff did not support the issue by proof that A. and B., as partners, were employed by plaintiff as agents, and in that character had jointly received money for plaintiff's use, it appearing that A. had never been employed by plaintiff, or received money for him solely. And that no difference would be made by proof that defendant knew that A. was to be employed only as partner with B.

DEBT on bond. On the trial, before Lord DENMAN, C. J., at the London sittings after Hilary term, 1843, a verdict was found for the plaintiffs, and damages assessed on the breach of the condition of the bond, subject to a special case; which was stated substantially as follows.

The declaration alleged that heretofore, to wit on, &c., defendant and one Thomas Addison, by their certain writing obligatory, sealed, &c., (joint and several bond for 1000*l.* payable to plaintiffs,) subject to a condition, whereby, after reciting that the above bounden T. A. had been appointed agent to plaintiffs, which office or employment he had accepted, and undertaken to perform the trusts thereof, the condition was declared to be, that, if T. A. did and should, from time to time, and at all times, during his continuance in the said office or employment, truly and faithfully demean and conduct himself as such agent, and, whenever thereto required, account for, pay and deliver to plaintiffs, their successors, &c., or such person or persons as

*515] *should be by them appointed for that purpose, all and every sum and sums of money which T. A. had then already received, or should or might at any time thereafter receive, for or on account or for the use of plaintiffs, and also if T. A. did or should, whenever thereunto required, give and deliver to plaintiffs, their successors, &c., or to such person or persons as should be by them appointed for that purpose, all and every the books, accounts, writings and things whatsoever belonging to plaintiffs, with which T. A. should be entrusted, or which should come to his hands or power on account or for the use of plaintiffs, then the said writing obligatory to be void, otherwise, &c. Averment that T. A. remained and continued in the service of plaintiffs, as agent to plaintiffs, for a long space of time, to wit from 7th September, 1836, until a certain other day, &c., to wit 1st January, 1842; and that, during the said time that T. A. remained and continued in the service and employment of plaintiffs as agent aforesaid, T. A. had and received, for and on account and for the use of plaintiffs.

divers sums of money, amounting, &c., to wit 445*l.* 6*s.* 10*d.*: nevertheless T. A. did not, when thereunto required, to wit on 1st January, 1842, account for, pay or deliver to plaintiffs, or to any person or persons appointed by them for that purpose, the last mentioned sum of money so due from T. A., or any part thereof; but, on the contrary, although T. A. was then and often since requested by plaintiffs so to do, he therein wholly failed and made default, and converted and disposed of the last mentioned sum of money to his own use, contrary to the form and effect of the condition of the said writing obligatory: by means of which, &c., the said writing obligatory hath become forfeited; *and thereby an action, &c. Nevertheless defendant, &c., (non-payment;) and the said sum of 1000*l.* still is and [*516 remains wholly unpaid.

Plea 1. That T. A. did not, during the time that he remained and continued in the service of plaintiffs as such agent as in the declaration mentioned, have or receive for or on account or for the use of plaintiffs the sums of money in the declaration in that behalf mentioned, or any or either of them, or any part thereof, in manner and form, &c. Conclusion to the country. Issue thereon.

(There was another plea, not insisted on by defendant.)

The facts were as follows.

In May, 1836, Edward S. Boulton, of Liverpool, share-broker and general commission agent, had been appointed agent to the plaintiffs for Liverpool and parts adjacent: and thereupon the said Edward S. Boulton, with Peter Boulton, entered into a bond for the same amount as the bond of Thomas Addison and defendant, and with a similar condition. Edward S. Boulton acted alone as agent for plaintiffs, until he entered into partnership with Thomas Addison, as after mentioned.

On 20th August, 1836, Boulton wrote the following letter to the plaintiffs, addressed to Alexander Boetefeur, their clerk in London, who managed that department of their business.

"I have to apprise you that I have recently entered into partnership with my friend Mr. Thomas Addison, junior, of this town. His connections are amongst the worthy and most respectable inhabitants of the town: and it would be a pleasure to me, and I believe very *advantageous to the company, to permit his name to be associated with my own as [*517 their accredited agent. May I trouble you to represent this to the board, and, if they consent, to inform me if any thing be necessary beyond appending to the advertisements Boulton and Addison, instead of my own name. Any references or security that may be required Mr. A. is prepared to give.

E. S. BOULTON."

On 22d August, 1836, Boetefeur, by direction of the plaintiffs, wrote to Boulton the following answer.

"On Friday next I will inform the committee that it is your wish that Mr. Thos. Addison, junior's, name should be added to yours for conducting

the agency. I apprehend that a new bond will be requisite, the expense of which he must bear."

On 26th August, 1836, Boetefeur, by similar direction, wrote to Boul as follows.

"I have placed before the committee your letter of 20th instant, proposing that the name of your partner, Mr. Thomas Addison, junior, may be added to your own in the agency: and I am directed to inform you that the committee will agree to the proposition, on condition that Mr. Addison do give security to the amount of 1000*l*. Upon your furnishing me with the name and a reference, (in London if possible,) the bond shall be made out and forwarded for execution."

On 30th August, 1836, Boul wrote to Boetefeur as follows.

"I am in receipt of your favour of the 26th instant; and I beg to tender
*518] for Mr. Addison the name of Mr. *Thomas Bold, of the firm of Bold & Russell, brokers, of this town, as his security.

"The signature of E. S. Boul,—*'BOULT & ADDISON.'*"

Do. Thos. Addison, junr.—*'BOULT & ADDISON.'*"

On 2d September, 1836, Boetefeur wrote to Boul as follows.

"I have placed your letter of the 30th ult. before the committee, who have approved the security of Mr. Addison. The bond accompanies this; which when executed I will trouble you to return."

On 7th September, 1836, Thomas Addison and the defendant executed the bond mentioned in the correspondence, and on which this action is brought.

On 7th September, 1836, Messrs. Boul & Addison wrote to the plaintiff's secretary enclosing the said bond duly executed.

There was a board placed over, or in front of, the counting-house or office of Boul in Exchange Buildings, Liverpool, describing him as agent to the plaintiffs; which board was altered, in September, 1836, and replaced in the front of the same office, the partnership firm of Boul & Addison being then inserted thereon, describing them as agents to the plaintiffs; and their names were also inserted in the public advertisements as such agents; and they continued in the service and employment of the plaintiffs, and to act as such agents, down to the time of their stopping payment on 22d June, 1841: when Boul & Addison communicated that fact to the plaintiffs by a letter, of 22d June, 1841, to Boetefeur, and which was as follows.

"We regret to inform you that, owing to severe losses *from bad
*519] debts and other circumstances, we are under the painful obligation to suspend our payments. The balance due to the company is of course secured by our sureties Mr. Bold and Mr. Boul. We are," &c.

"BOULT & ADDISON."

On 25th June, 1841, the said Boetefeur, by the plaintiffs' direction, wrote to the defendant the following letter.

"On the 23d instant. I received a letter from our agents, Messrs. Boul

& Addison, informing me that, owing to severe losses from bad debts and other circumstances, they were under the painful obligation to suspend their payments: a communication which has occasioned me much regret. As you are surety for Mr. Addison, I beg to apprise you that the premiums and duty owing to this corporation will amount to between 400*l.* and 500*l.*”

On 7th August, 1841, Boetefeur, by direction of plaintiffs, again wrote to the defendant.

“On 25th June, I wrote to inform you that Messrs. Boulton & Addison, late agents to this corporation, were indebted to the company between 400*l.* and 500*l.* The account has been agreed: and the balance is 445*l.* 6*s.* 10*d.* As you are joint security with Mr. Peter Boulton, I will thank you to arrange with that gentleman, so that the sum of 445*l.* 6*s.* 10*d.* may be remitted to the corporation: sincerely regretting to have to call on you on this distressing occasion.”

On 8th August, 1841, the defendant wrote to Boetefeur as follows.

“I have received your favours of the 25th June and 7th instant, and will, without loss of time, see Mr. Peter Boulton to make arrangements for the settlement of Messrs. Boulton & Addison's account with your company. In the mean time, I beg the favour of your sending me a copy of the bond I signed; and please also state if Mr. Peter Boulton's is of exactly the same tenor.” [*520]

Annexed to the case were copies of the two last accounts between the plaintiffs and Boulton & Addison, showing the balance due to the plaintiffs, and which were to be read as part of the case; and also copies of the last account between Boulton and the plaintiffs, and the first account between Boulton & Addison and the plaintiffs. The accounts showed a balance due from Boulton & Addison to the plaintiffs for money received. All these accounts were sent in the first instance from the plaintiffs to Boulton prior to his partnership, and afterwards to Boulton & Addison down to the period of their failure, and were received by the parties at Liverpool, and the blanks left for their charges, and for advertisements, filled in; and the accounts were then sent back to the plaintiffs, and corrected, if necessary, and, when approved, retained by the plaintiffs.

The defendant contended at the trial that the letters which passed between Boulton and Boetefeur were not evidence in this cause against the defendant; which point was reserved for the opinion of the court: and that this action could not be maintained against defendant on the above facts, because, in fact, Boulton & Addison were the agents of the plaintiffs, and not Thomas Addison, junr.; and that the money in question was jointly received by Boulton & Addison as joint agents, and not by Thomas Addison, junr. alone, or as sole agent. In answer to which the plaintiffs contended: [*521]

First, That such last objection could not be raised on the defendant's pleading; and secondly, if it were so raised, that the plaintiffs were still entitled to recover.

The court were to draw inferences as a jury might.

Kelly for the plaintiff. The question is, whether, upon the facts stated, the money received by Boulton & Addison jointly is within the condition of the bond. Addison never was, and never was supposed to be, separately agent for the plaintiffs; nor was he ever in a capacity to receive moneys separately for them. Therefore, the moneys received jointly are, within the meaning of the condition, received by Addison in the course of his conduct "as such agent." And the defendant's letter of 8th August, 1841, shows that he was perfectly aware of the partnership. It is true that the meaning of the condition of a bond is to be collected from the language of the instrument itself: but, if the language admits of a double interpretation, that lets in extrinsic evidence. In *Barclay v. Lucas*,^(a) the condition of a bond recited that plaintiffs had agreed to take J. into their service and employ as a clerk in their shop and counting-house; and it provided that the bond should be void if J. should account for and pay to the plaintiffs all sums which he should receive in their service. The plaintiffs, who were bankers, took in a new partner; and, J. continuing in the service, it was held that the condition extended to money which he received in the service of the new partnership. Lord MANSFIELD said: *"[The
*522] question in this case turns upon the intention of the parties at the time of entering into the contract. In questions upon intention, we must look to the subject matter of the contract." Here, no doubt can be entertained that the subject matter of the contract was the conduct of the partners in the agency. On the other side, reliance may be placed on *Bellairs v. Ebsworth*, 3 Campb. 53. There the condition was that N. should account for all the sums that he should receive for the plaintiffs; N., with the knowledge of the plaintiffs, took M. into partnership: and it was held that the condition did not apply to moneys received by N. and M. jointly. But there the introduction of the partner changed the position of the parties after the bond was given. Lord ELLENBOROUGH said that the obligor "by no means undertook for the good conduct of any future partner." Here the partnership existed when the bond was made; the bond was actually made with reference to the partnership agency: so that the criterion applied in *Bellairs v. Ebsworth*, is in favour of the present plaintiffs. A declaration averring that A. promised is supported by proof of a joint promise by A. and B. If, here, the word "separately" could be imported into the condition, no evidence at all would be receivable as to the joint transactions; but such evidence was admitted in *Bellairs v. Ebsworth*; though, when admitted, it failed to show a state of facts contemplated at the time of giving the security. [COLERIDGE, J. If, as you say, the condition on the face of it has a double meaning, you are seeking to give evidence to explain a patent ambiguity.] There is no ambiguity at all, in the sense of the rule referred to. It is not that the language *may apply to one
*523] only of two cases, and there is doubt to which it applies; but that

(a) Note (a) to *Barker v. Parker*, 1 T. R. 291.

it comprehends both. If Boulton & Addison had received the money jointly, the condition might well recite a receipt by Addison. So a debt due from a defendant as surviving partner may be described as a debt due from him individually; *Richards v. Heather*, 1 B. & Ald. 29. It is on an analogous principle that, if one of two partners be sued, he can take the objection only by plea in abatement; *Rice v. Shute*, 5 Burr. 2611, S. C. 2 W. Bl. 695; (a) where Lord MANSFIELD said: "All contracts with partners are joint and several: every partner is liable to pay the whole." If a deed describe land as land let to A. for fifty years, evidence must be given to show to what land that description applies: so evidence may be given to show what agency existed here when the bond was given. Proof of receipt of money by Addison's clerk for him would satisfy the breach. The declaration alleges, and the plea admits, the fact of the agency: to what agency is that to be referred? It surely was competent to the plaintiffs to show that the money received was received under the only agency to which the record can apply. And, further, as the receipt by both partners is a receipt by each, the issue, as joined, must be found for the plaintiffs.

W. H. Watson, contrâ. This is merely a question on the construction of the condition. The defendant never became surety for Boulton & Addison, so far as the language of the instrument goes; and that language cannot be enlarged by extrinsic evidence. *Chapman v. Beckinton*, 3 Q. B. 703, is a very strong case for the defendant. (He was [*524 then stopped by the court.)

Lord DENMAN, C. J. The only question certainly is as to the meaning of the condition. And of that there can be no doubt. When a party makes himself surety for the conduct, not of A. and B., but of A., the stronger proof you give that he knew the relation in which A. and B. stood to each other, the stronger you make the inference arising from his mentioning only A. Suppose the condition recited that the two were joint agents, and then spoke only of the conduct of one, would not that be a strong proof that the suretiship was intended to apply only to the separate acts of that one? Mr. *Kelly's* comment upon *Bellairs v. Ebsworth*, 3 Campb. 53, is very ingenious: but the case is quite against him. Lord ELLENBOROUGH, with his usual strong sense, says: "The defendant was surety for Philip Nott, and not for Mingay, Nott and Co." Mr. *Kelly* says that evidence of the relation of the parties was there necessarily admitted: the language of the report is "it appeared:" whether that was upon the mere opening is not said. Lord ELLENBOROUGH argues entirely on the recital and the scope of the condition. Here, too, even if the defendant's knowledge of the partnership were a fit subject of inquiry, I do not see that it is shown. His letter of 8th August, 1841, does not show it.

WILLIAMS, J. Engaging for the good conduct of one man, and engaging

(a) It appears from *Stackwood v. Dunn*, (3 Q. B. 822,) that a plea in bar, by a sole defendant in assumpsit, alleging that the promise was made by him and L. jointly, and then setting off a debt due to the two, contains a good confession.

*525] for the good conduct of two, *are essentially different engagements, both in ordinary understanding and in legal effect. Mr. *Kelly* does not, and could not, contend that any evidence could be resorted to for the purpose of enlarging the sense of the condition. The case which he suggested, most nearly approaching to the admission of evidence here, was that of a deed describing land by its being let to A. for a certain term. In that case, he said the facts must be inquired into. They must so: that is a case of latent ambiguity. *Lord Cheyne's Case*, 5 Rep. 68 a, is the earliest authority which I recollect on that point. But this is not a case of latent ambiguity. Mr. *Kelly* seeks to show that he is using the evidence, not to extend the meaning of the bond, but to prove the fact of a breach. No doubt all facts may be put in evidence that establish that: but the evidence here is not applied *eo intuitu*. I agree that the whole question resolves itself into the construction of the condition: and it is clear to me that it would be a distinct violation of the meaning expressed by the language of the condition to introduce a responsibility for more than the party named.

COLERIDGE, J. I agree that the meaning of a written instrument often requires to be shown by extrinsic evidence; but then the evidence is produced to explain the intention which is expressed in the instrument. But, where a clear meaning appears without any evidence at all, we must not break in upon the rule which prohibits the varying of a written instrument by extrinsic evidence. The meaning here is perfectly clear: Mr. *Kelly's* *526] construction would amount to the addition of a liability for *the conduct of a party not named. As to the language of the plea, we must suppose that it admits the agency and denies the receipt in the same sense in which they are alleged in the declaration: that brings us back again to the language of the condition.

WIGHTMAN, J. The question is whether a condition, by which a party makes himself answerable for the conduct of one person, renders him liable for the conduct of another with whom that person acts jointly. Recourse is had to the analogy of cases of latent ambiguity; and it is sought to show, by extrinsic evidence, an intention beyond the language of the condition. If we are to determine this case on the extrinsic evidence, I think the result will be against the plaintiffs. For, if the defendant did know that the partnership existed, and yet undertook, in the condition, a responsibility for the conduct of Addison only, it looks as if he did not intend more. In truth, the recital is the proper key to the meaning of the condition. In *Hassell v. Long*, 2 M. & S. 363, which has not been adverted to, a question arose whether a bond conditioned to secure the payment of all sums received by a collector extended beyond the current year: and Lord ELLENBOROUGH said that the recital was the "proper key" to the meaning, that it spoke of the party as collector and receiver of the land tax, that the land tax was an annual tax, that the party, as receiver, was an annual officer, and that in the recital "not one word occurs describing an act or intimating a receipt

beyond the limits of the then current year of collection." Here the recital does not contain *a word referring to any agency but that of Addison. Then Mr. *Kelly* raises the question, whether the receipt by [527 Addison & Boulton is a receipt by Addison. On ordinary principles, each party is liable for receipts by either. But the question here is, not to what extent the one can make the other liable to the employer, but whether the defendant became surety for the acts of both. Mr. *Kelly* urged that the defendant would be liable for whatever Addison's clerk, as such, might receive. It appears to me that this is inapplicable to the question. No doubt the receipt by the clerk is a receipt by his master. But the receipt by a partner is a receipt by both partners: Boulton had as much power as Addison to appropriate the money received: Addison could not take the money out of Boulton's hands as he could out of those of his own clerk: no money therefore was received by him separately. *Bellairs v. Ebsworth*, 3 Campb. 53, is a direct authority in favour of the defendant. As to the plea: it is contended that this receipt comes within the language of the issue. I think there is no weight in that: we must take the plea with reference to the matter charged in the declaration; and it seems to me that the receipt charged in the declaration is a receipt by Addison in a separate capacity, and not such a receipt as appears on these facts.

Judgment for defendant.

*The QUEEN v. The Inhabitants of BLOXHAM. Nov. 16. [*528

The jurat of an affidavit purporting to be sworn by C. E., was drawn as follows:

"Sworn at Banbury in the county of Oxford, this 8th day of February, 1844. William Munton, a commissioner," &c.

Held, a fatal objection that the words "before me" were not inserted between the date and the signature, though an exhibit was annexed, having subscribed to it the words, "This is the notice referred to in the annexed affidavit of C. E., sworn before me this 8th day of February, 1844. Wm. Munton."

On appeal against an order of justices removing certain paupers from the parish of Bloxham to the township of Epwell, both in the county of Oxford, the sessions (October, 1843,) quashed the order, subject to the opinion of this court on a special case. The orders having been brought up by certiorari, and a case stated and set down in the crown paper for argument, application was made to a judge at chambers to quash the certiorari on the ground that an affidavit on which it was obtained had a defective jurat.

The affidavit by Charles Egg, was the usual one, verifying the notice of motion for a certiorari, and stating service of it upon two of the justices who made the order of sessions. The jurat was as follows.

"Sworn at Banbury in the county of Oxford, this 8th day of February, 1844.

"WM. MUNTON,

"A commissioner of the Court of Queen's Bench."

Then followed the notice, after which were the words :—

“ This is the notice referred to in the annexed affidavit of Charles Egg, sworn before me this 8th day of February, 1844.

“ WM. MUNTON.”

The objection was that the words “ before me ” were not prefixed to the commissioner’s name in the jurat.

On the hearing at chambers, in this term, PATTESON, J., directed that the point should be discussed before the *full court. A rule nisi was
*529] obtained this term for quashing the certiorari: and, the special case now coming on for argument,

Keating and *Pashley* showed cause against the motion to quash. First, the application comes too late, no reason being assigned for delay: *Davis v. Watkins*, 2 Dowl. N. S. 930. Secondly, it is sufficient if the court see that the deposition is really authenticated by the commissioner; and, if any doubt arises on the jurat itself, it is removed by the words following the exhibit, where the commissioner speaks of the affidavit as sworn before him. The officer having jurisdiction, if there be an ambiguity the court will, as in *Regina v. Silkstone*, 2 Q. B. 520, intend, if possible, that things were ritè acta. [Lord DENMAN, C. J. The objection here is, not ambiguity, but insufficiency.] In *Symmers v. Wason*, 1 B. & P. 105, the jurat of an affidavit to hold to bail omitted the place where it was sworn; and this was not deemed fatal. In *Rex v. Emden*, 9 East, 437, the defendant was indicted for perjury in an affidavit which was set out with a jurat stating it to be sworn in London; and perjury was assigned on this among other statements. He pleaded autrefois acquit, and set forth a former indictment, which contained no allegation as to the place of swearing: and it was held that the acquittal on this indictment was a good bar, the jurat not being a part of the affidavit necessary to be stated in an indictment for perjury.

Pigott, contrà, was here called upon by the court. Commissioners
*530] derive the power of taking affidavits “ from a statute, (29 C. 2, c. 5,) and must show that the power is exercised according to it. “ An affidavit is an oath in writing,” “ sworn before, and attested by him who hath authority to administer the same:” 1 Bac. Abr. 124, tit. *Affidavit*, (7th ed.) Here the swearing before a person having authority does not appear. *Rex v. Emden*, which turned upon the necessity of setting out the jurat in an indictment, cannot affect this case. Nor does the decision of the court on an ambiguous jurat, in *Regina v. Silkstone*, apply here. The affidavit in that case had the words, “ before me,” and the court read them distributively. [COLERIDGE, J. You say that this affidavit, on the face of it, is not sworn at all.] That is the defect; and it cannot be aided by reference to another document. If this were allowed, the court might be called upon to collect a jurat from twenty different instruments. And the affidavit was complete when the commissioner signed his name. He was then functus officio as to that document. In *Regina v. Shipston upon Stour*, antè, p. 119, where one of the examina

tions, in a case of removal, did not purport to be taken before two justices of the county, an attempt was made to supply the defect by reference to another examination immediately preceding; but the court would not allow this: and PATTESON, J. observed that, if they permitted the objection to be so removed, they would next be asked to apply the same rule to affidavits. "If," he said, "one affidavit purported to be sworn, 'before me a commissioner,' &c., it would be urged that any affidavit on the same paper, coming after that, must be taken to be so sworn also, though the words 'a commissioner' &c. were omitted." That case is "nearly in point."

The strictness with which the courts have enforced accuracy in [531] jurats as to place and other circumstances appears from *Rex v. The Justices of the West Riding*, 3 M. & S. 493; *Molling v. Poland*, 3 M. & S. 157; *Osborn v. Tatum*, 1 B. & P. 271; *Howard v. Brown*, 4 Bing. 393, and many other instances. The court said in *Rex v. the Justices of the West Riding*: "To dispense with these forms is only to get into uncertainty and mischief, and by a strain of jurisdiction to help parties through that which they ought to look to themselves." The consequence of such a practice would be that, on indictment for perjury, a commissioner might be called upon to supply from memory circumstances omitted in the jurat, which he can hardly be expected to do with accuracy in any individual case of the many which come before him. The jurat ought to be so complete that he may verify it, like an attesting witness, on the mere sight of his signature.

Pashley was then heard in continuation. Many of the cases in which great accuracy has been enforced as to the form of affidavits have arisen on rules of court, which it has been thought necessary to uphold. But no rule requires that the words "before me" should precede the signature of a commissioner. In *Osborn v. Tatum*, no title of a court was given; which is a very different objection from the present. But, where the place of swearing was omitted in the jurat of an affidavit made before a commissioner, leave was given to amend; *Cass v. Cass*, 1 Dowl. & L. 698. In *Ex Parte Hall*, 8 Law J. N. S. 211, (Queen's Bench,) (a) the "com- [532] missioner had accidentally omitted to subscribe his name to the affidavit; but this court, on motion, suffered it to be amended by adding the name, though the time for filing affidavits was past. So amendments have been permitted where a mistake has been made in the jurat by a judge's clerk; *Ex parte Smith*, 2 Dowl. P. C. 607; or in a rule by an officer of the court; *Downing v. Jennings*, 5 Dowl. P. C. 373. The commissioner here would have been guilty of great misconduct if he had subscribed an affidavit not sworn before him: and "the general rule is that,

(a) The motion was made April 15th, 1839, before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js. The affidavit was sworn by Mr. Hall, for the purpose of showing cause against a rule for striking him off the roll of attorneys. Cresswell, who was to support that rule, said that he would not oppose the application to amend, if the court thought fit to grant it: and a rule was made absolute in the first instance, as follows. "Upon reading the affidavit," &c., "it is ordered that John Hall" "be at liberty to swear his affidavit, (in the first affidavit mentioned,) filed in this matter on the 8th day of April instant."

where a duty is performed by a public officer, he is presumed to have discharged it rightly:" per COLERIDGE, J., in *Rex v. Whiston*, 4 A. & E. 607. The same doctrine was acted upon in *Rex v. Witney*, 5 A. & E. 191, and *Doe dem. Nanney v. Gore*, 2 M. & W. 320. The Court of Common Pleas held an affidavit sufficient where the jurat stated it to be sworn before a commissioner by virtue of a "commission forth" (instead of "issued forth") from that court; *Daley v. Mahon*, 6 Dowl. P. C. 192. In *Regina v. Shipston upon Stour*, ante, p. 119, the court thought that no sufficient connexion appeared between the two examinations: here the words added to the exhibit refer expressly to the swearing of the affidavit.

*533] *Lord DENMAN, C. J. On the first impression we always feel desirous to get over objections of this kind if we can: but we must abide by established rules; and of these there is none more wholesome than that documents confirmed by oath should set forth that they are sworn before a person having proper authority. Here the authority is given by act of parliament; and we cannot see that it has been duly exercised, unless the jurat shows it. No instance has been mentioned in which this has not been held necessary. The strictness to be observed in this respect does not depend on the existence of rules, but on the necessity of the thing itself. It has, in some instances, been departed from; but the variety of decisions which have been cited on the subject is a strong reason against such a practice. The observation of the court in *Rex v. The Justices of the West Riding*, 3 M. & S. 494, that "to dispense with these forms is only to get into uncertainty and mischief, and by a strain of jurisdiction to help parties through that which they ought to look to themselves," is very important. By doing so we invite negligence. I think this is not an irregularity which can be waived: a defect of jurisdiction is shown; and the objection is one which we cannot avoid giving effect to. We shall thus induce more accuracy in future. As to *Ex parte Hall*, (a) I must say, though I was party to the decision, that the indulgence was one which ought not to have been granted.

WILLIAMS, J. I will only say, as to the reference from one document to another, that we must look to the jurat of the affidavit which it is proposed to use, *and that alone. The words relied upon for the reference

*534] may induce as much doubt as the jurat itself.

COLERIDGE, J. This defect is not a mere irregularity, but affects the jurisdiction. As to the words of reference in the exhibit, the commissioner there speaks of the annexed affidavit, but only states incidentally that it was an affidavit sworn before him. If this instrument were admitted, we might in the same manner be referred to some subsequent paper or affidavit subscribed by the commissioner. We must look at the jurat itself. The objection may seem to be of little importance; but if ever we are to use strictness it should be on affidavits and all that relates to their form. Here it is consistent with the jurat that the oath was not administered by this commissioner at all.

WIGHTMAN, J. The jurat is clearly not sufficient. Consistently with it, the affidavit may have been sworn before a person having no authority. I doubted at first whether the fault was not cured by the reference in the document annexed; but, if that effect could be produced by referring from one document to another, a defective jurat might be remedied by a subsequent affidavit.

Rule absolute, without costs.(a)

(a) In *Regina v. The Inhabitants of Norbury*, argued in Easter term, 1846, before Lord DENMAN, C. J., and PATTISON, J., a certiorari had been obtained, on affidavit, sworn in the country, March 16th, 1844, to bring up an order of sessions confirming an order of removal subject to a special case. On April 30th, 1846, a rule nisi was obtained on the authority of *Regina v. Bloxham* (suprà), for quashing the certiorari, because the jurat of the affidavit was imperfect, the commissioner's name not being preceded by the words "before me." Neale showed cause (May 7th, *1846), and cited *Empey v. King*, 13 M. & W. 519, as showing that an omission of this kind was not, on principle, fatal. He contended that the defect did not render the affidavit a nullity, as appeared from *Rex v. Emden*, 9 East 437; and that it was merely an irregularity, waived by delay on the other side, and amendable; *Ex parte Smith*, 2 Dowl. P. C. 607. *Phillimore*, contrà, was not heard. [*535]

Lord DENMAN, C. J. We cannot overrule *Regina v. Bloxham*. The case in the Exchequer is consistent with it. In *Ex parte Smith*, my brother PATTISON permitted the amendment, seeing that the deponents had, in fact, been regularly sworn; and he rather doubts whether he did rightly. Here it does not appear that the party was sworn before any one. The case is the same as *Mr. Munton's*. PATTISON, J. I am not prepared to overrule *Regina v. Bloxham*. If time would cure a defect of this kind, eight months would have cured it there. In *Empey v. King*, the omission happened in an affidavit sworn at a judge's chambers, and the Court of Exchequer expressly distinguished between such an affidavit and one sworn before a commissioner.

Rule absolute.

DOE, on the several demises of GUY WARWICK and MARTHA ISABELLA RAMSEY, v. JOHN COOMBES and WILLIAM AUGUSTUS SMITH.

By the written customs of the manor of Hackney, (confirmed by stat. 21 Ja. 1, c. 6, private,) every person to whose use lands are surrendered "ought to come within three years" after the surrender is presented, and be admitted, (sect. 34.)

Held, that this custom was only for the benefit of the lord, who might waive it, and grant a valid admittance after the expiration of the three years.

Therefore, where P., copyholder of the manor, surrendered to the use of W., who was admitted more than three years after presentment of the surrender: *Held*, that W., after admittance, might maintain ejectment against P. and all claiming under her.

EJECTMENT for a messuage and land. On the trial, before COLERIDGE, J., at the Middlesex sittings after Easter term, 1840, it appeared that the premises were of copyhold tenure, parcel of the manor of Hackney, commonly called The Lord's Hold, in Middlesex. A verdict was found for the plaintiff, subject to the opinion of this court upon a case, the material parts of which were as follows.

Mary Susannah Piggott, being seised of the premises *for an estate to her and her heirs, according to the custom of the said manor, by an indenture, by her duly executed and enrolled, bearing date 28th August, 1815, between her, M. S. P., of the first part, John Green of the second part, and Guy Warwick, one of the lessors of the plaintiff, of the third part, in consideration of 1050*l.* by Green paid to M. S. Piggott, bargained and [*536]

sold unto Green, his executors, administrators and assigns, an annuity of 110*l.* during the lives of Green and his wife, and the longer liver of them, and charged the same upon the premises in question; and covenanted with Green, his executors, &c., that if the annuity should be unpaid for twenty-one days, it should be lawful for him, his executors, &c., into the premises in question to enter, and receive the rents and profits thereof; and also covenanted that she, M. S. P., would surrender the premises in question to the use of Guy Warwick, upon trust for the better securing the regular payment of the said annuity, and, subject thereto, and to the powers therein contained for levying and raising the said annuity and all costs incurred by reason of the non-payment thereof, upon trust for the said M. S. Piggott, her heirs, &c.

On the day of the date of the said indenture, M. S. Piggott made a conditional surrender, out of court, of the premises in question, to the use of Guy Warwick, upon the trusts of the indenture; and such surrender was presented by the homage at a general court baron which was the next general court baron held for the said manor, viz. on 23d April, 1816: but Warwick was not admitted tenant, pursuant to the surrender, by the lord of the manor, according to the custom thereof, at a court baron held for the said *manor, until 11th April, 1820, being a period of more than *537] three years after presentment of the surrender. There was evidence that it was not usual to be admitted on conditional surrenders necessarily within three years after such surrenders; and that there were many such surrenders, and many admittances in fact, after the expiration of three years.

On 3d April, 1820, all arrears of the said annuity were duly paid.

Mrs. Piggott died in 1838. The defendants are her personal representatives.

Green died in 1818; and Mrs. Green died in February, 1839. The lessor Martha Isabella Ramsey is the personal representative of Green: and an arrear of the said annuity then was, and still is, due to her.

The customs of the said manor were settled by an indenture between the lord and his copyhold tenants, dated 20th June, 15 Ja. 1: and such indenture was confirmed by an act of parliament, 21 Ja. 1, c. 6, (private). (a) Some of the customs therein contained are as follows.

1. "*In primis*, by the customs of the said manors, and either of them, all the copyhold lands, tenements and hereditaments," &c. (statement that the lands, &c., held by persons named in the indenture, were copyhold and customary.) "And all the said lands, tenements and hereditaments have been passed, and are to pass and go from such persons as, according to the contents of these schedules, have power and are enabled to make surrenders to any other person or persons by way of surrender, to be made to the hands of the lord, by the acceptance of the steward of the manor," &c. (describing different modes of surrender.) "Which surrender or surrenders have been, and shall and may be to the use of any person or persons, and their heirs for ever in fee simple, or any person *or persons in fee tail, or for life or lives, with remainders or *538] without remainders, as lands may be assured by the course of the common laws of this realm, or else to the use of the last will and testament of the surrenderors, or of any other persons, according to the intent and limitation of such last will and testament."

(a) "For confirmation of the copyhold estates and customs of divers copyholders of the manors of Stepney and Hackney, according to certain indentures of agreement, and a decree in the high Court of Chancery, made between the lord of the said manors and the copyholders."

19. "*Item*, by the custom of the said several manors, every copyholder of inheritance in fee simple may surrender his said copyhold lands and tenements, or any part or parcel thereof, unto the lord to the use of any person or persons, and to his and their heirs for ever, or to his or their heirs, of his or their bodies, or any otherwise in tail, or for life or lives, or years, or to any person or persons, and his or their heirs, to the intent the said copyhold tenant may declare his last will and testament upon the same lands and tenements, or to any other use or uses, unless it be to any corporation or corporations, or bodies politic or corporate, and every copyholder in tail, or for life, lives or years, of either of the said manors, may in like manner, by the customs of the said manors, and of either of them, surrender their copyhold lands, tenements or hereditaments, or any part thereof, according to the nature of their estates, so the same surrender be made according to the custom concerning surrenders, as afore in these presents is specified, or hereafter ensueth; and all the same persons, to whose use every surrender shall be made, are to have their copies made to hold of the lord by the rod, according to the custom of the manor whereof they have been holden by the rents and services therefore due and accustomed; upon every of which surrenders the fine and fines for the same hereafter expressed, is by the said custom to be paid, and to be entered into the several copies, or the margents of them."

22. "*Item*, all surrenders taken of women, as aforesaid, or of men," &c. (recapitulating the modes of surrender,) "shall be and ought to be by the homage presented at the first or second next general court holden for the manor whereof the same is holden after the taking thereof, or within one year and a day next after the taking of the same surrender, if any such general court be holden within a year and a day next after the same surrender so taken; or else if no such general court be holden within a year and a day, then to be by the homage presented at the next general court to be holden for the same manor, next after the same year and day, is and shall be a good surrender, as if the same had been taken by the steward or his deputy of that manor, or woman examined, as aforesaid, in open court; or otherwise, all surrenders taken by the said reeve," &c., "and not presented by the said homage in manner and form aforesaid, are and shall be void." Then followed a declaration that every surrender to the use of a will, not presented according to particular rules laid down, "is and shall be void."

25. "*Item*, all surrenders" of a particular kind, are to be published and notified as there prescribed, "or else those surrenders are also void."

27. "*Item*, the lord or lords of the said manors, or either of them, "and their and [*539 every of their stewards for the time being, shall and ought to accept and allow of all and every surrender and surrenders to be made of any the lands, tenements or hereditaments, whereof any of the persons named parties to the said indenture are seised as copyholders, according to the tenor, intent and true meaning of these schedules, and the articles therein contained; so as the parties surrendering be not before that time by the homage of the same manor presented, and found to have made or committed some matter of forfeiture of those lands and tenements so surrendered, contrary to the customs and articles in these schedules expressed, or some or one of them. And the lord of the same manor by his steward, for such fine, as in or for such things is before expressed, shall grant the same copyhold lands, tenements and hereditaments so surrendered, according to the tenor, use and intent of the same surrender; and shall duly admit such person or persons to whom, or to whose use, such surrenders shall be made."

34. "*Item*, every person to whose use any of the said lands or tenements shall be surrendered, ought to come within three years after the same be presented, and take up the same by himself, if he be of age, and to be admitted, as aforesaid, and to pay his fine, or else by his guardian, as aforesaid."

49. "*Item*, for treason or felony whatsoever that shall be committed by any copyholder of the said manors, or of any of them for which he shall be lawfully attainted, he shall forfeit his copyhold lands and tenements to the lord of the said manor; and for all other offence or offences, act or acts whatsoever, for which a freeholder ought, by the common laws of the land, to forfeit his freehold lands and tenements, there a copyholder of the said manors, or of either of them, shall forfeit, as a freeholder ought to forfeit in like case, his freehold; but if a copyholder be outlawed for any cause saving treason or felony, the lord shall not have the issues or profits of his lands: and if a copyholder make a feoffment of his copyhold, gift in tail, or lease for life or lives by deed or without deed, by livery and seisin thereupon, or shall suffer a recovery at the common law, levy a fine, or wilfully refuse and deny to pay, do or perform his rents, fines, suits, customs and services at any time hereafter due to the lord or lords of the said manors, or either of them, for their said copyholds, the same wilful refusal being presented to the homage by the oaths of three customary tenants, with the reeve or his deputy, (the said tenants or reeve, nor his deputy, being none of the lord's servants,) and being found and presented by the homage, the same shall be holden and reputed a forfeiture of his estate, whatsoever he shall have by copy of court-roll, at the time of any such act committed or done in so much of his and their copyhold lands and tenements, as he shall have committed any such act, and only for so much of his lands and tenements, out of the which the said quit-rent and other

duties are demanded and shall be due, and wilfully denied by the said tenant or *540] *tenants, as aforesaid; or if any copyholder shall in the lord's court, or elsewhere in any court of record, disclaim to hold his said copyhold lands and tenements of the lord of the manor whereof his lands and tenements are holden, or shall by pleading in the lord's court, or other court of record, wilfully claim their copyholds to be freeholds, or willingly and wittingly plead in any real action at the common law in chief as a freehold tenant, or shall willingly and wittingly do any other act or things in or concerning his now lands and tenements, which shall be a disseisin or disinheritance of the lord or lords of the said manors, or of either of them, their heirs or assigns, (other than such acts as in these articles are especial mentioned or dispensed withal,) that then he shall forfeit his and their estate of and in the same lands and tenements so disclaimed to be holden or claimed to be freehold, or for which he shall plead in chief, or do any such other act or thing as is aforesaid. Finally, the lord of the said manors," (Stepney and Hackney,) "or of either of them, shall have all such other forfeitures, issues, profits, and advantages of the said copyholds, as shall grow due to him by any statute laws of this realm, being not against and contrary to these articles and customs here expressly set down."

It was agreed that the customs of the said manors, as stated in a printed book, entitled "Customs and privileges of the manors of Stepney and Hackney, in the county of Middlesex," &c., 1736, should be deemed part of the case. (a) The case was argued in this term. (b)

W. H. Watson for the plaintiff. The defendants contend that the surrender and admission of Warwick are void, because the admission did not take place within three years of the presentment of the surrender. Sect. 19 of the customs authorizes the surrender, if made according to the custom; other sections regulate the surrenders; and, by sect. 27, the lord must accept surrenders properly made. Then sect. 34 declares that the person to whose use the surrender is made "ought to come within three years"

*541] after the presentment of *the surrender and be admitted. The lord, under this section, has the right to insist upon the party coming in to be admitted; but the surrenderor, and those claiming under her, cannot take advantage of this condition. It was intended for the benefit of the lord, who may enforce it by proclamations and seizure quousque. The surrender is not void: in this respect, the language of sect. 34 differs from that, for instance, of sect. 22, which does declare surrenders taken in a particular way to "be void." There does not appear to be even a forfeiture for non-compliance with sect. 34; for sect. 49, which enumerates the causes of forfeiture, does not specify this. And, if there were a forfeiture, it would enure to the benefit of the lord only. Moreover the lord, by admitting after the expiration of the three years, would have waived the forfeiture had there been one. Customs imposing forfeiture are construed strictly, as was held, in the case of a custom more strongly worded than this, in *Baspool v. Long*, Cro. Eliz. 879. Further, sect. 34 does not apply to conditional surrenders. (The argument on this point is omitted.)

Kelly, contra. The admittance not having taken place till after the expiration of the three years, the surrender has become absolutely void; and the title remained in the surrenderor. The general law of copyhold does not apply; these customs are now in the nature of statutory provisions.

(a) By sect. 50, it was declared that the acts of certain tenants of particular estates should not prejudice those in remainder.

(b) November 12th. Before Lord Denman, C. J., Williams, Colman, and Wightman, Ja.

If a statute were to declare that women "ought" to have dower, that would give them the absolute right. The utmost that could be said here would be that those representing *the surrenderor are estopped from disputing the surrenderor's act. But, even supposing that to be so, [*542 the surrenderor was not a party to the failure of admittance. Her surrender gave a right to admittance within the three years, but no more. No valid admittance, therefore, having taken place, the surrenderee had no title: the surrenderor, till the admittance of the surrenderee takes place, is the tenant. Nor does it make any difference, as to this, that the surrender was only conditional. (The argument on this point is omitted.)

W. H. Watson in reply. To hold that sect. 34 absolutely avoided the surrender would be inconsistent with sect. 50, which declares that the default of the tenant for life shall not prejudice the remainderman.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (November 25th,) delivered the judgment of the court.

This was a special case. The land sought to be recovered was copyhold of the manor of Hackney: and the title of the lessors was not disputed, except on one point, the admittance, which, it was contended for the defendants, was void because made more than three years after the presentment of the surrender, and so contrary to the custom of the manor.

The customs of the manor of Hackney were settled by an act of parliament in the reign of James I.: and, by the thirty-fourth section, it is provided that "every person to whose use any of the said lands or tenements shall be surrendered, ought to come within three years after the same be presented, and take up the same by himself, if he be of age, and to be admitted, as aforesaid, *and to pay his fine, or else by his guardian, as aforesaid." [*543

This was a case of conditional surrender, presented in April, 1816: and the surrenderee was admitted in April, 1820. On the part of the lessors it was contended that, with regard to surrenders of every kind, the custom was to be taken as binding only between lord and tenant, and not in favour of third persons, so as to make an admittance after the three years void: and that, at all events, in respect of a conditional surrender, it would not so apply, where by the intention of the parties no admittance might take place at all; and none would be contemplated until a breach of the condition.

It is unnecessary to consider the latter point, because we agree with the plaintiff on the former. The force of the word "ought," in the recited item, is equivalent to "it is the custom;" and the obvious intent of the custom is that the lord should have his real tenant on the rolls, and know who he is, within a given time, and receive the fine for alienation to which he may be entitled. If the custom be not observed, the lord may insist upon it, and enforce it by such remedies as the customs may give him, seizure quousque or otherwise: but he may also waive it; and he does so

by the act of admittance. To the defendants, who are the personal representatives of the surrenderor and mortgagor, and who stand in her place, the delay of the admittance works no prejudice: and it would be most unjust to allow them to avail themselves of it to defeat the lessor's security. The judgment will be for the plaintiff. Judgment for plaintiff.(a)

(a) See *Doe dem. Robinson v. Bousfield*, antè, p. 492.

*544] *WALTER v. DE RICHEMONT, commonly called LE VICOMTE DE RICHEMONT. Nov. 18.

A defendant arrested on *capias* upon a judge's order, under stat. 1 & 2 Vict. c. 110, s. 3, is supersedeable unless the plaintiff proceed to execution within two terms inclusive after judgment, conformably to R. Hil. 2 W. 4, I. 85.

And, where judgment in debt was signed for want of a plea: *Held*, that the time ran from such signing, although the costs were not taxed.

HINDMARCH, in this term, obtained a rule calling on the plaintiff to show cause why the defendant should not be discharged out of custody. By the affidavits in support of the rule it appeared that, on 1st March last, the defendant was arrested on a *capias*, (dated 3d February, 1844,) issued under a judge's order, in pursuance of stat. 1 & 2 Vict. c. 110, ss. 3, 4, in an action of debt at the suit of the plaintiff, and had remained in custody ever since. On 22d March, the declaration was filed. Final judgment by default was signed on 27th March. The plaintiff had not, on the 2d November, proceeded to charge the defendant in execution.

From the affidavit in answer it appeared that judgment was signed for want of a plea, and that on the margin of the incipitur of the judgment was written the word "costs," with no sum following: that, to save expense, the costs had not yet been taxed, because an application to be discharged, made in March last by the defendant at chambers, had been discharged with costs, which had never been paid; and that the plaintiff did not intend to waive or give up the costs in this action, and had left a blank space for filling them in when taxed.

Lush now showed cause. The application is made under R. Hil. 2 W. 4, I. 85, 3 B. & Ad. 886, which directs that **"The plaintiff shall*
 *545] *proceed to trial, or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment; of which the term in, or after which the trial was had shall be reckoned one."* No objection arises as to the time of filing the declaration. [*Hindmarch*, for the defendant, admitted this.] The question then is whether final judgment, in the sense of the rule, has been signed. The costs have not been taxed: the judgment is therefore only inchoate. *Colbron v. Hall*, 5 Dowl. P. C. 534, may appear to be an authority in favour of the defendant. There *LITTLEDALE, J.*, held that, when judgment in debt was signed in Michael-

mas vacation, but the roll not carried in till Easter term following, the time nevertheless ran from the first signing. It does not distinctly appear when the costs were taxed in that case: LITLEDALE, J., said: "I am of opinion that a judgment was completed in Michaelmas vacation, 1834. Final judgment was then signed, and the plaintiff might then have waived his costs, and sued out execution immediately for the debt." The decision may so far be supported, that it was not necessary to take in the roll: but, if the learned judge meant to lay down that the judgment was complete before taxation of costs, the dictum appears to have been unnecessary in the case, and contrary to authority. In *Butler v. Bulkeley*, 1 Bing. 233, it was held that judgment is not final till the taxation of costs is completed. In *Salter v. Slade*, 3 Nev. & M. 717, 724, S. C. (not S. P.) 1 A. & E. 608,(a) according to the report in Nevile & Manning, *TAUNTON, J., expressed the same opinion. In *Pearce v. Derry*, 4 Q. B. 635, a plaintiff, [*546 having obtained a verdict in July, 1841, wrote on the margin of the postea "judgment signed the 13th day of December, 1841;" this was written on the day named; but he did not complete the taxation of costs till February 1st, 1842; and this court ordered the entry on the judgment roll to be altered to the latter date. PATTESON, J., there said: "*Butler v. Bulkeley*, 1 Bing. 233, and other authorities which have been cited, show that signing the judgment is a thing contemporaneous with taxation of costs. If this were not so, what is judgment signed for, unless indeed the party signing dispenses with costs?" Here, by the blank left in the judgment book, it is clear that the plaintiff did not waive the costs. But, further, R. Hil. 2 W. 4, I. 85, 3 B. & Ad. 386, is inapplicable. The custody which was supersedeable under that rule is not the custody under which the present defendant is charged. The rule was made shortly before the Uniformity of Process Act, 2 & 3 W. 4, c. 39, (passed 23d May, 1832.) Under that statute, an action commenced either by summons or *capias*. It appears from Tidd's Practice, ch. 15, that as early as the time of Charles the Second,(b) and thence downwards, there have been rules adapted to the practice for the time being, regulating the time for declaring against parties in custody. And, by R. Trin. 3 W. 4, 5 B. & Ad. 467, (24th May, 1833,) the practice under the Uniformity of Process Act was regulated; *and it was ordered that the defendant should be entitled to his [*547 discharge if he was detained in prison under a *capias* and the plaintiff did not declare before the end of the next term after such arrest, unless further time was given to declare. But the species of custody to which this series of regulations referred no longer exists. Stat. 1 & 2 Vict. c. 110, abolishes arrest on *mesne* process as a step in the action; the *capias* and arrest under sects. 3, 4, are altogether collateral to the process. Therefore in *Ireland v. Berry*, 5 Q. B. 551, it was decided that R. Trin. 3 W. 4, 5 B. & Ad. 467,

(a) See 4 Q. B. 641, note (c) to *Pearce v. Derry*.

(b) See 1 Tidd's Pr. 368, 369, 9th ed. R. K. B. East, 16 C. 3; Peacock's Rules, 57. Also, R. K. B. Mich. 1654, sect. 11; Peacock's Rules, K. B. 30.

does not apply to custody under sect. 3: and the earlier cases of *Brown v. McMillan*, 7 M. & W. 196, and *Regina v. Sheriff of Montgomeryshire*, 9 M. & W. 448, are in accordance with this view. Nor is there any hardship in such practice. A prisoner might apply to the court for the relief of insolvent debtors; or he may now, under stat. 7 & 8 Vict. c. 96, obtain a final order for protection from being taken or detained under any process.

Hindmarch, contrà, was stopped by the court.

LORD DENMAN, C. J. I think this was a final judgment, so far as regards the operation of R. Hil. 2 W. 4, I. 85, 3 B. & Ad. 386. The decision in *Ireland v. Berry* is inapplicable to the present question.

PATTESON J. It is true that, for many purposes, judgment is not completed till the costs are taxed. But here the plaintiff signed judgment for want of a plea. Will he say that this did not bar the defendant from *pleading? He is not to keep the defendant in custody by delaying the taxation. As to the other point, I felt a doubt, because I found that some judges had at chambers taken a view different from that which I entertain. But it appears to me that, in doing so, they gave a meaning to our decision in *Ireland v. Berry*, 5 Q. B. 551, which we did not intend it to bear. It is true that a *capias* under stat. 1 & 2 Vict. c. 110, s. 3, is not process, nor a step in the cause: it may be sued out after declaration as well as before, and is collateral to the proceedings in the action. The time for declaring cannot be in any way connected with it, as it was when the *capias* was process in the cause. But what is the *capias* for? The defendant must go to prison unless he finds bail, that is, bail above. That bail above follows the practice which existed before stat. 1 & 2 Vict. c. 110, and is a security to answer the judgment or render the defendant. Therefore after judgment the practice may well be, and is, now the same as before; and a prisoner has the same right to be charged in a given time as he had before the act, though the arrest is wholly collateral to the course of the cause.

WILLIAMS and COLERIDGE, Js., concurred.

Rule absolute.

*549] *The QUEEN v. The Inhabitants of WOOLDALE. Nov. 20.

To prove the settlement by apprenticeship of Joseph Beaumont, an indenture was put in, dated and purporting to be between Joseph Roberts, of one part, and John Beaumont of the other. It was very inaccurately worded, and spelt. It witnessed "that the said John Beaumont hath, of his own free will, and with the consent of and by his father's John Beaumont, ~~has~~ put and bound himself apprentice to and with the said Joseph Roberts, and with him after the manner of an apprentice to dwell, remain and serve, from the date hereof, for, during and until the term of his attain ages 21 thence next following be fully compleated and ended;" during which term "the said apprentice his said master shall serve," &c. "And the said Joseph Roberts" doth covenant with "the said Joseph Beaumont, apprentice," to teach him, &c., to pay him 3s. "yerely and every year during is apprenticeship," and to allow him two weeks to go to school, "yerely and every year during his apprintiship." "In witness whereof, the parties above named to these present indentures have set their hands and seals." And, at the bottom, followed "Joseph (L. s.) Roberts. Joseph (L. s.) Beaumont."

Joseph Beaumont gave evidence that he was bound by the above indenture, and served under it. *Held:*

1. That it appeared from the deed that the John Beaumont, party thereto, was the Joseph Beaumont therein named apprentice.
2. That extrinsic evidence might be given that the person so meant was the pauper, and that he had executed the indenture.
3. That the meaning of the parties sufficiently appeared to be that the apprentice should be bound until he attained the age of twenty-one.
4. That this, combined with the date of the indenture, might by extrinsic evidence of the pauper's age be made sufficiently certain as to the term for which he became bound.
5. That the sessions, upon the above evidence, were justified in finding a settlement by apprenticeship.

On appeal against an order of two justices, removing Joseph Beaumont and his wife from the township of Upperthong to the township of Wooldale, both in the West Riding of Yorkshire, the sessions confirmed the order, subject to the opinion of this court upon the following case.

The only examination on which the order of removal was made was that of the said Joseph Beaumont: and the same, so far as related to his alleged settlement in Wooldale, was as follows. "I am seventy-one years of age: my father's name was John Beaumont: he resided at Scarfield, in Upperthong, and was a cloth dresser. On or about the 28th day of March, 1789, I was bound apprentice to Joseph Roberts, of Cinder Hill, *in the township of Wooldale, in the same Riding, clothier, by the indenture of apprenticeship now produced, bearing date the said 28th day of March, 1789, and made between the said Joseph Roberts, therein described 'Joseph Roberts of Cinder Hills in the parish of Kirburton, and of York, clothier,' of the one part, myself, therein by mistake called John Beaumont, and therein described (a) John Beaumont of Holmfirth in the parish of Almonbury, and count (a) aforesaid, of the other part. My master, the said Joseph Roberts, resided and inhabited at Cinder Hills, in Wooldale; and I lived with him there for some time before I was bound apprentice. I also resided, inhabited and slept at my said master's house at Cinder Hills, in Wooldale aforesaid, as an apprentice, under the said indenture, for several years, and until I was twenty-one and at liberty from my master. My father is one of the witnesses to the indenture. When the indenture was executed, it was left in the care of John Beaumont, carrier, the other witness to it; and, when I came of age, I got it from him, and have kept it ever since. I have done no act to gain a settlement in my own right since I was apprentice to Joseph Roberts aforesaid." The indenture of apprenticeship above referred to was in the words following; and a copy thereof was duly sent by the overseers of Upperthong to the overseers of Wooldale, as part of the examination on which the order was made.

"This indenture, made the 28th day of March, 1789, in the 29^(a) year of the reign of our sovereign lord George the Third, by the grace," &c., "and in the year of our Lord, 1789: between Joseph Roberts (a) *of Cinderhills in the parish of Kirkburton, and of York, clothier, [55] of the one part, and John (a) Beaumont, of Holmfirth, in the parish

of Almonbury(a) and count (a) aforesaid of the other part, witnesseth, that the said John(a) Beaumont hath, of his own free will and with the consent of and by his father's(a) John Beaumont, has put and bound himself apprentice to and with the said Joseph Roberds,(a) and with him after the manner of an apprentice to dwell, remain and serve, from the date hereof, for, during and untill the term of hie(a) attain ages 21(a) thence next following be fully compleated and ended ; during all which term the said apprentice his said master well and faithfully shall serve, his secrets shall keep," &c. "And the said Joseph Roberds,(a) for himself, his executors, administrators or(a) assigns, doth covenant, promise and grant, by these presents, to and with the said Joseph(a) Beaumont, apprentice, that he, the said Joseph Roberds,(a) his executors, administrators or(a) assigns, shall and will teach, learn and inform him, the said apprentice, or cause him to be taught, learned and informed, in the art or mystery of a clothier, which the said master now useth, after the best manner of knowledge that hee (a) or they may or can, with all circumstances thereunto belonging: and also shall find and provide to aud for him, the said apprentice, sufficient and enough meat, drink, washing and lodging: also the said master is to pay his apprentice, or cause to be paid, three shillings, yereley(a) and every year during is(a) apprenticeship: and the said master to provide him all wearing apparel whatsoever during his apprenticeship, and, at the end, to find, or cause to *552] be found, two and good sufficient *sutes(a) of cloaths, according to custom: and the said master to allow his apprintis(a) two weeks to goo(a) to school, yereley(a) and every year during his apprintiship: and for the true performance of all and singular covenants and agreements aforesaid each of the parties aforesaid doth bind himself unto the other firmly by these presents. In witness whereof, the parties above named to these present indentures interchangeably have set their hands and seals, the day and year above written.

"Sealed and delivered, (being first duly stamped.)

"JOHN BEAUMONT, Carer.(a)

"JOHN BEAUMONT, Clothier.

"JOSEPH (L. S.) ROBERTS.

"JOSEPH (L. S.) BEAUMONT."

The following were grounds of appeal against the order.

1. That the examinations do not, nor either of them does, disclose any ground of settlement and removal other than an alleged service and residence under a supposed indenture of apprenticeship, which indenture, as appears by the examination of Joseph Beaumont, is, and always was, bad and insufficient and not obligatory on any person thereby supposed to be bound apprentice; inasmuch as the said indenture is, and always was, ambiguous on the face thereof, both as to the person who was intended to be bound apprentice thereby, and the term for which it was intended that he should be bound, and in other respects.

(a) Sic.

2. That, the supposed indenture appearing by the said examination to be ambiguous on the face of it, the justices, at the hearing whereon the said order was *made, improperly, and contrary to law, admitted [*553 parol evidence in explanation of the said ambiguities, as appears by the examination of Joseph Beaumont; and the examinations do not, nor either of them does, contain legal evidence of the supposed binding of Joseph Beaumont.

3. That, assuming the said evidence to have been properly admitted by the justices, and that Joseph Beaumont did, at the time and in the manner in his examination mentioned, sign, seal and deliver, as his deed, the document in the same examination described and set forth as an indenture, nevertheless the examinations do not, nor either of them does, show that Joseph Beaumont was ever bound apprentice to Joseph Roberts; the supposed mistake in the said examination of the said Joseph Beaumont being such as altogether to prevent the said supposed indenture from being, or taking effect as, the deed of Joseph Beaumont.

Pickering and *Hardy*, in support of the order of sessions. (a) There is no ambiguity on the face of the indenture. At any rate, as between strangers, the deed cannot be held void. But the master might have sued the party executing on his covenant to serve. In *Mayelstone v. Lord Palmerston*, Moo. & M. 6, the declaration stated that a deed was made by James Cook; but the party was twice named as George Cook in the deed, and executed it as George Cook: and ABBOTT, C. J., held that this was a fatal variance, and that the deed was the deed of George Cook. It was not there suggested that the deed was void. The *proper form of declaring in such cases appears from *Hall v. Cazenove*, 4 East, 477, where the alle- [*554 gation was that the instrument purported to be indented, made, &c., on 6th February, but in fact was indented, made, &c., on 15th March; and that it purported to be made by plaintiff of one part, and defendant and J. B. of the other part, but was in fact sealed and delivered by plaintiff and defendant only. It was therefore open to show, here, that the Joseph Beaumont, who appeared to have executed, was the person designated as John Beaumont at the beginning of the instrument. In *Williams v. Bryant*, 5 M. & W. 447, the defendant, whose name was William Francis Bryant, had executed a bond by the name William Bryant; and it appeared that, at the time of the execution, he was known by the name William Bryant. It was held that he might be declared against on this bond as "William Francis Bryant, sued by the name of William Bryant." *Hyckman v. Shotbolt*, 3 Dyer, 279 b, shows that, if a man execute by a wrong name, he may be sued by that name. *Gould v. Barnes*, 3 Taunt. 504, is to the same effect. From *Maby v. Shepherd*, Cro. Jac. 640, it appears that, if a party be named A. Z. in the body of a bond, but sign as B. Z., and that be his real name, he should nevertheless be sued as A. Z. That is the principle of *Monkhouse v. Hutchinson*, Bunb. 101. Many of the authorities on this

(a) The beginning of this argument was heard on 16th November.

point were discussed in *Evans v. King*, Willes, 554, where it was held that a party could not be sued as "Henry King, otherwise Henry Vaughan King." But the order of sessions here must be supported if the apprentice could have been sued by any name; for that shows him to have entered *into an available contract of apprenticeship. It is to be remarked *555] that the ambiguity occurs, so far as appears on the face of the deed itself, at the part where the master covenants: till then the party is called John Beaumont, and the ambiguity is merely latent: at that part the words "with the said Joseph Beaumont, apprentice," occur. But the master's covenant is unimportant for the purpose of settlement; *Rex v. St. Peter's on the Hill*, 2 Bott, 394, pl. 495, 6th ed.; *Rex v. Fleet*, 2 Bott, 396, pl. 500, 6th ed.: this part may therefore be struck out, and there will be no patent ambiguity. Or, at this part, the word "Joseph Beaumont" might be omitted. Lord COKE puts, as instances where "a grant is good, albeit the name of baptism be mistaken," "if lands be given to Robert Earl of Pembroke where his name is Henry, to George Bishop of Norwich where his name is John;" Co. Litt. 3 a. In *Rex v. Exminster*, 6 A. & E. 598, the word "Melhuish" after "Elizabeth" was rejected, where the rest of the instrument showed that the party meant was "Elizabeth Matthews;" *Rex v. Morris*, 1 Leach's C. C. 109, and *Langdon v. Goole*, 3 Lev. 21, were similar cases. Upon the principle of *Doe dem. Westlake v. Westlake*, 4 B. & Ald. 57, cited in 2 Phil. Ev. 334, 9th ed., the court will look at the whole indenture and signature, and then it will appear that John Beaumont means the party signing. In *Shore v. Wilson*, (*Case of Lady Hewley's Charities*), 9 Cl. & Fin. 355, 556; 2 Phil. Ev. 286, 9th ed., PARKE B. said: "For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz. every material fact that will enable the court to identify the *556] person *or thing mentioned in the instrument, and to place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it." This agrees with Proposition V. in Wigram's Examination of the Rules of Law, respecting the admission of extrinsic evidence, &c., p. 51, 3d ed. In *Doe dem. Gord v. Needs*, 2 M. & W. 129, (a) a testator devised a house to John Gord, the son of George Gord; land to George Gord the son of George Gord; and another house to "George Gord, the son of Gord;" and evidence of the devisor's declarations was admitted to show that by "George Gord, the son of Gord," he meant the son of George Gord. There PARKE, B., in delivering the judgment of the court, said: "There would then have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to 'George, the son of Gord,' had stood alone, and no mention had been made in the will of George the son of John Gord, and George the son of George Gord." That supposition corresponds with the present case: there appears but one son of John Beaumont

(a) See *Doe dem. Allen v. Allen*, 12 A. & E. 451.

he elder. The court sees that no person named John Beaumont has bound himself apprentice; but that Josoph Beaumont has done so. In *Lord Say and Seal's Case*, 10 Mod. 40, 46,(a) the court collected a nominative case to the words "hath granted," in a deed, from a comparison of the names of the parties, and from the effect of the deed, and the execution of it by a particular party. In Wigram's *Examination*, &c., p. 54, it is laid down that "a description, though false in part, may, with reference to *extrinsic circumstances, be absolutely certain, or, at least, sufficiently so to enable a court to identify the subject intended; as [*557 where a false description is superadded to one which by itself would have been correct:" and reference is made to *Door v. Geary*, 1 Ves. sen. 255; *Shep. Touchst.* 432; *Day v. Trig*, 1 P. Wms. 286, and Lord KENYON'S language in *Thomas v. Thomas*, 6 T. R. 671, 676. *Colpoys v. Colpoys*, Jac. 451, is a very strong case to the same effect. In *Dowset v. Sweet*, Ambl. 175, a legacy was given "to John and Benedict, sons of John Sweet;" it appeared that John Sweet had but two sons, James and Benedict; and it was held that James and Benedict should take. The evidence here is offered, not to contradict an instrument, but to give operation to an instrument which, without the evidence, would have no operation at all. It merely does away with the effect of the surplus words from which alone the difficulty arises.(b) The principles laid down in the judgment in *Miller v. Travers*, 8 Bing. 244, 247, confirm the view taken by the respondents.

It will be objected that the instrument is unintelligible as to the term of the apprenticeship. But, even if the term were such as the law does not sanction, the effect would be that the indenture was voidable, not void; *Rex v. Woolstanton*, 1 Bott, 545, pl. 707, 6th ed.; *Rex v. St. Nicholas in Ipswich*, Burr. S. C. 91. This, however, is not a parish binding; and the restrictions of stat. 43 Eliz. c. 2, s. 5, are inapplicable. And the time here was capable of being ascertained by the age of the apprentice; so that there is *sufficient certainty according to the maxim *certum est quod certum reddi potest*. "A lease to one during the minority of J. S., who is [*558 then ten years of age, is a good lease for eleven years, if J. S. so long live;" 4 Bac. Abr. 81, 7th ed., *Grants*, (H) 2, for which *Boraston's Case*, 3 Rep. 19 a, is cited. It is true that here the word "hie," if referred to the last name mentioned before, would mean "Joseph Roberts:" but the last antecedent is "the last word which can be made an antecedent so as to have a meaning;" per TINDAL, C. J., in *Rex v. Wright*, 1 A. & E. 434, 445.(c) "Words in construction must be referred to the next antecedent, where the matter itself doth not hinder it;" Finch's Law, 8, Book i. ch. 3. Here the promise, till he attain twenty-one, can refer only to the party bound.

Further, the apprentice has served and taken the benefit of the deed: he

(a) Affirmed in *Dom. Proc. Viscount Say and Seal v. Lloyd*, 4 Bro. P. C. 73, 2d ed. See *Doe dem. Wyndham v. Carew*, 2 Q. B. 317.

(b) See the words of Anderson, J., in *Godbolt*, 131, pl. 149.

(c) See *Chapman v. Becham*, 3 Q. B. 723, 732.

could not have denied his execution of it. If a man enter and hold under an indenture he is bound by the conditions thereof, though he has not executed; Litt. s. 374.(a) [COLERIDGE, J. But here the difficulty is not as to the execution: the pauper has executed; but the question is as to the effect of that which he has executed.] The principle, as shown by *Rez v. Arnesby*, 3 B. & Ald. 584, may be thus applied to settlements of apprenticeship: where the pauper has not executed at all, he will not gain a settlement by the service; but, if he does execute, then by serving under the instrument so executed he identifies himself as the party to whom it relates.

Again, third parties may at any rate give evidence to explain the document. In *Rez v. Wickham*, 2 A. & E. 517, third *parties (the *559] respondents in an appeal) were allowed to contradict by evidence the description of lands in a deed of feoffment. The distinction as to the party giving the evidence was made in *Rez v. Cheadle*, 3 B. & Ad. 833. Misnomer can be pleaded only by the party misnamed; *Doctrina Placitandi*, 243, *Misnomer*, 1.

R. Hall and *Pashley*, contra. There is an ambiguity here, which being patent, cannot be explained by extrinsic evidence, and, unexplained, makes the instrument inoperative. In *Clarke v. Istead*, 1 Lutw. 894, an action was brought against Robert Clarke, and the declaration alleged that Robert Clarke, by the name of John Clarke, made his bond; and issue was joined on non est factum. A special verdict was taken, which found that Robert Clarke, the defendant, sealed, and as his act and deed delivered, a bond of the tenor following: Noverint universi per præsentes, me Johannem Clarke, de, &c., teneri et firmiter obligari, &c.: and the condition was set out, in which he was named "the above bounden" Robert Clarke only, and which was signed Robert Clarke: and it was further found that, at the time of the sealing, &c., the defendant's name was Robert Clarke and not John. On this verdict the Court of King's Bench gave judgment for the plaintiff; but the judgment was reversed in the Exchequer Chamber. This decision was relied on in *Gould v. Barnes*, 3 Taunt. 504; and the rule suggested on the other side from *Maby v. Shepherd*, Cro. Jac. 640, agrees with it. In both *Clarke v. Istead* and *Maby v. Shepherd*, the party signed by his true name, as here: no extrinsic evidence can furnish stronger identification *560] than the *verdicts in these two cases: and in them there was not, as in *Hyckman v. Shotbolt*, 3 Dy. 279 b, any fraud suggested. It follows from the authorities cited, and from an *Anonymous Case* in Owen, 48, that if it be not clear from the body of the instrument that the pauper Joseph is the party bound, the instrument as to him is invalid. The signature is not essential to the deed; the sealing is sufficient; 2 Rol. Abr. 21, *Faits* (D); Shep. Touchst. 56, c. 4; 2 Bl. Com. 306; *Cooch v. Goodman*, 2 Q. B. 580, 597.(a) The case is manifestly not within the class of latent ambiguities, described and commented upon in 2 Phil. Ev. 311, (9th ed.)

(a) See *Burnett v. Lynch*, 5 B. & C. 589, 601, 602.

(b) See *Aveline v. Whisson*, 4 M. & G. 801.

On the face of the instrument, it either refers only to John, on which supposition, (as held in the cases which have been cited,) ambiguity cannot be first introduced and then removed by extrinsic evidence, or it is ambiguous, on which supposition the ambiguity is patent. So again, if the signature be not noticed, it of course creates no ambiguity; if it be noticed, the ambiguity is patent. In neither case can evidence be introduced. *Doe dem. Gord v. Needs*, 2 M. & W. 129, and *Colpoys v. Colpoys*, Jac. 451, will be found to recognise the distinction between cases where the instrument in its body does, and those where it does not, suggest an ambiguity: and *Miller v. Travers*, 8 Bing. 244, 249, fully negatives the legality of "calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will." The case of a deed is stronger than that of a will; for the courts, in their anxiety to carry out a testator's intention, have been less strict in construing wills than instruments inter vivos. *Without the extrinsic evidence, it may be that Joseph Beaumont executed for John. It is suggested that words may be rejected: but no rejection will make an instrument binding Joseph. If the master's covenant be rejected, the instrument binds John; and no ground appears for rejecting more: if the master's covenant be retained to explain what precedes, then the ambiguity is patent. In *Rex v. Exminster*, 6 A. & E. 598, the court thought that the instrument itself was not ambiguous; and so of the indictment in *Rex v. Morris*, 1 Leach, C. C. 109. That even omissions cannot be supplied by evidence appears from *Rex v. Hood*, 1 Moo. Cr. C. 281: nor can mistakes; *Foster's Cr. L. 312*, *Hoye v. Bush*, 1 M. & Gr. 775. And, even if the extrinsic evidence were admissible, it would not go far enough: for it does not show that there is no John Beaumont who might have been bound. It is true that a christian name followed by a particular title, as of earl or bishop, may be explained or neglected; but that is because there can be but one such earl or bishop: whereas there may be many persons named John Beaumont. *Williams v. Bryant*, 5 M. & W. 447, and other cases of that sort are inapplicable; there the party was as well known by one name as the other. [WIGHTMAN, J. The deed is some evidence of that in the present case.] In *Lord Say and Seal's Case*, 10 Mod. 46, the instrument was a bargain and sale, which, the court said, was "therefore to be interpreted more favorably than a deed:" and a grantee appeared, so that on the face of the deed there was implied the act of granting, and consequently a grantor. It is true that, in some cases, a party executing a deed has been held to be estopped *from disputing that it refers to himself. Mr. Preston, in his additions to Shep. Touch. 233, lays down rules, of which the first two [*562] are as follows. "1st. If a grant, or at least a bond, be made by A. by the name of B. he is bound by estoppel. 2dly. If the grant of A. be made by the name of B. and he signs with his proper name of A., then there is not any estoppel, and the grant is void." The second is the present case. The first is the case supposed by the court in *Hyckman v. Shotbolt*, 3 Dyer,

279 b. The doctrine in Preston agrees with Com. Dig. *Fait*, (E 3.) The case is the stronger, because the question arises on the Christian name ; 2 Rol. Abr. 21, *Faits* (B), pl. 3. *Mayelstone v. Lord Palmerston*, Moo. & M. 6, was a question as to the description of a deed: the person misdescribed was no party to the action: the only question was whether in fact the deed was the deed of such person ; and, the person whose it actually was being misdescribed in the declaration, there was of course a variance. The case however, does show that the mere adoption by a party of a name in a deed does not make it his deed.

Next, the deed is ambiguous in its terms. It may be construed to be an apprenticeship for twenty-one years. If "ages 21" mean "the age of twenty-one," it still does not appear whose age is meant. (a)

Then, as to the argument that the apprentice, having taken the benefit of the indenture, would be subject to it. Even if that were so, the question is, not whether he was an apprentice, but whether he was bound apprentice by this indenture. This was essential *to the settlement, by stat. *563] 3 & 4 W. & M. c. 11, s. 8, till stat. 31 G. 2, c. 11, s. 1 ; and under the latter statute the binding must be by either an indenture or a stamped deed, writing or contract ; *Rex v. Ditchingham*, 4 T. & R. 769. *Rex v. Arnesby*, 3 B. and Ald. 584 ; which last case shows that the apprentice could not have been sued upon this covenant, and that his infancy alone would be an answer : and the same may be collected from *Rex v. Austrey*, Burr. S. C. 441.

It makes no difference as to the point before the court, that the question arises between third parties. That, indeed, prevents an estoppel : but the appellants here are not insisting on any estoppel.

Lord DENMAN, C. J. It appears to me that the sessions have done right. A deed is produced, to show that a settlement was gained by this pauper. The first question is, whether he executed the deed. As to that, there is no doubt that he signed, sealed and delivered. Perhaps some little difficulty arises upon the indenture ; still there is no ambiguity ; for, taking the whole indenture together, it clearly appears to the court that the word John is used by mistake for Joseph : all doubt as to this is removed, when we see that Joseph is named as the apprentice, and that John is used for the name of the party bound. There is then no ambiguity to be removed, except as to the party who executed ; and that clearly is matter of evidence. Another objection, not much insisted on, arose from the oddness of the language used. But the meaning evidently is, that the binding is to continue *until the party bound attain the age of twenty-one ; the *564] deed is dated ; and the time at which the apprentice would attain that age may be shown by evidence ; there will therefore be no uncertainty as to the time. A great deal of learning has been expended upon the argument ; and we are much indebted to the Court of Exchequer, which, in *Williams v. Bryant*, 5 M. & W. 447, decided upon the ques-

(a) See 15 Vin. Abr. 560, tit. *Nonsense*, (A).

tion of variance. I rather think that in that case we should have been satisfied with deciding that the question did not arise under the new rules. The decision, however, as far as it goes, agrees with our view in this case. If there be any construction upon which the pauper might be bound by this indenture, it appears to me that it is sufficient to give him a settlement.

WILLIAMS, J. The question is, who is actually bound. Till that be answered, there is a serious doubt; for it is essential to the settlement that the pauper should bind himself. Taking the whole indenture together, it sufficiently appears that Joseph is the party bound. He certainly did execute. Parol evidence must of necessity be introduced to show the application of any instrument to particular persons and circumstances, and, in a case of this kind, to show that the party did serve in conformity with the deed. No more than that is done here. I admit that there is confusion enough. But the rest of the court think, and I agree, that, the word "apprentice" being applicable to Joseph, there is enough to show that he is the person designated as John. The principal difficulty is therefore got over. *As to the strangely framed sentence, if bad English could spoil a deed, there is enough to spoil this over and over again. [*565 But no one can doubt that the meaning is, that the pauper is to serve till he arrives at the age of twenty-one. The deed itself contains evidence that the apprenticeship is to last for more than forty days; for the master covenants for things to be performed yearly and every year.

COLERIDGE, J. I am of the same opinion. It appears to me that there is no question of ambiguity, but merely a difficulty of construction, which is a very different thing. In all cases there must be some parol evidence. In the case of the simplest deed naming John Smith, you must have evidence to apply it to the particular person. Here the person to whom the deed is to be applied happens to be Joseph Beaumont. He says, I served the apprenticeship, and I was bound by the indenture. Then, in the deed, Joseph is described as an apprentice, and called at the same time the said Joseph. That is sufficient to show that he is the person called John, who binds himself. Then, is not it clear that the person so called John is the person who is a party to the indenture by the name of Joseph? The deed, therefore, may be well construed, and it is clear who is the person meant. As to the other point, I agree that we find very bad English: but cannot we see that the intention of this deed, drawn by illiterate persons, is to bind the pauper until he attains the age of twenty-one? That alone would not do; for the period might be so nearly over at the time of the execution that there might not be forty days left. But I can find, on the deed, from the covenants of the master, *that more than forty days remained at the time of the execution. [*566

WIGHTMAN, J. I am entirely of the same opinion. On the face of the deed, there are but two parties to it, Joseph Roberts and John Beaumont. It further appears that John is intended to be bound apprentice; and, at the end of the deed, comes the ordinary phrase "the parties above named"

“have set their hands,” and then the names of Joseph Roberts and Joseph Beaumont are signed. The parties signing, therefore, admit themselves to be the parties named in the deed. I should be strongly of opinion that, if Joseph Beaumont had signed the name of John Beaumont, he might have been sued as John Beaumont, and would have been estopped from denying that that was his name. That is a mode of proceeding referred to in *Maby v. Shepherd*, Cro. Jac. 640, and *Hyckman v. Shotbolt*, 3 Dyer, 279 b. Or there might have been an averment that he was as well known by the name of John as that of Joseph, as appears from *Williams v. Bryant*, 5 M. & W. 447: and his execution of the present indenture would have been cogent evidence against him on this point. The indenture therefore might have been made good as against the pauper by either of two modes. The only remaining question is as to the length of time: and to this the maxim applies, *certum est quod certum reddi potest*.

Order of sessions affirmed.

*567] *The QUEEN v. The Inhabitants of LATCHFORD. Nov. 20.

The examination of a pauper showed that he was born in the appellant parish, and was afterwards bound and served as apprentice, and inhabited, under such service, partly in the appellant parish, and partly in the respondent parish, and more than forty days in each. The respondents proposed, at the sessions, to rely on the birth settlement. *Held*, that they were not precluded from so doing, by the fact that the examination contained allegations which, if true, showed a subsequent settlement by apprenticeship.

The appellants relied upon a settlement in the respondent parish, and proved that, on the last night of the service, the pauper slept in that parish. *Held*, that, to establish this settlement, they must prove the apprenticeship, and could not treat it as admitted by the respondents, though the latter had sent examinations in which it was alleged, and it had not been traversed by the grounds of appeal.

Under stat. 5 G. 2, c. 19, s. 2, an order, removed by certiorari, is “confirmed” by simply discharging the rule for quashing it.

ON appeal against an order of two justices, whereby Peter Carter and his wife and two children were removed from the township of Warrington in Lancashire to the township of Latchford in Cheshire, the sessions confirmed the order, subject to the opinion of this court on a case, the material statements of which were as follows.

The order appealed against was made upon examinations from which the following are extracts.

Examination of Richard Carter. I have a son named Peter, who was born on 24th December, 1816, in the township of Latchford. When my said son was upwards of eighteen years of age, he was bound apprentice, under a legally stamped indenture, for the period and until the full end and term of five years, to John Gregory, of the township of Warrington. I signed the said indenture for the binding of my said son Peter; and the mark opposite the first seal on the indenture now produced is my mark, and was made at the time aforementioned, for the binding of my said son Peter to John Gregory aforesaid. My said son Peter served the said John Gre-

gory, under the said indenture, for upwards of two years and ten months : and in the summer *months my said son slept in the township of Latchford, during such service under the indenture aforesaid ; and [*568 my said son slept in the township of Warrington in the winter months, during his service with the said master under the indenture aforesaid. My said son Peter served his said master in the township of Warrington up to and on 23d of December, 1837 ; and, on the evening of the said 23d December, slept and resided in my house in the township of Latchford. My said son was twenty-one years of age on Sunday, 24th December, in the year aforesaid. And he never served his said master afterwards.

Examination of the pauper, Peter Carter. I am twenty-seven years of age, last birthday. I am the son of the last witness, Richard Carter. On 16th February, 1835, being then upwards of eighteen years of age, I bound myself, with the consent and approbation of my father, to John Gregory, of the township of Warrington, cordwainer, for and until the full end and term of five years, under a legally stamped indenture ; and which indenture was duly signed, by myself, my father and my master, in the presence of each other, and in the presence of, &c. (witnesses.) The indenture now produced is the one under which I was bound an apprentice as aforesaid. I served my said master under the said indenture from the day of the date of the indenture on and until the evening of Saturday, 23d December, 1837, when I left my said master's house, about 8 o'clock on the evening of the said 23d December. During the time I so served my said master under the indenture aforesaid, I resided and slept at the house of my father in the township of Latchford, in the county of Chester, in the summer months : and, on the Saturday and Sunday evenings of the winter months, and during the remainder of the *winter months for five nights in each week, I re- [*569 sided and slept in the township of Warrington, in the county of Lancaster aforesaid. I resided and slept in the township of Latchford for more than forty days, during which time I served my said master under the indenture aforesaid. And I resided and slept in the township of Warrington for more than forty days, during which time I served my said master under the indenture aforesaid. After I had served my said master, under the said indenture, on 23d December, 1837, I went and slept at the house of my father in the township of Latchford aforesaid, the evening of the said 23d December : and I continued to live and sleep at the house of my father for upwards of two years after the said 23d of December, until I married. I was twenty-one years of age on the evening of 24th December, 1837 ; and I never served my said master under the indenture aforesaid after the 23d December last mentioned. I never did any act to gain a settlement, by rental or in any other way, after leaving my said master : and I left him on my arriving at the age of twenty-one years.

A subscribing witness to the indenture proved its execution.

Examination of John Gregory. The indenture of apprenticeship now produced, is the one made for binding Peter Carter to me for five years.

The said indenture was delivered to me at the time of signing the same. The said Peter Carter served me, under the indenture, in Warrington, for upwards of two and a half years, during and at which time he sometimes slept in the township of Warrington, and at other times sleeping in the township of Latchford. I cannot tell the exact period of time when Peter Carter left my service.

*570] *There was also a deposition as to chargeability.

The indenture was sent with the examinations, and was set out in the case, and corresponded with the description in the above examinations.

The following grounds of appeal were stated.

1. That the order and examination, of which copies are sent to us, are bad on the face thereof.

2. That the examination, whereon the said order of removal was made, was and is insufficient, and does not contain legal evidence of any settlement having been gained by the paupers, or any of them, in our said township of Latchford.

3. That, in fact, the said paupers, or any of them, are not nor is, and never were or was, legally settled in our said township of Latchford.

4. That the said paupers were, at the time of making the said order, and still are, legally settled in your said township of Warrington, by reason of the said pauper Peter Carter having been so apprenticed as in the said examination is stated, and having served under the said indenture of apprenticeship in the said township of Warrington for more than forty days, and having slept in the said township of Warrington for more than forty days during such service, and on the last night thereof; and by reason of the said township of Warrington being the last place in which the said pauper Peter Carter completed the period of forty days' service and residence under the said indenture of apprenticeship.

5 and 6. Not material here.

7. That the said pauper, Peter Carter, on the said 23d day of December, 1837, left the service of his master, John Gregory, in the said examinations named, and refused to serve under the said indenture of apprenticeship.

*571] *8. That when the said pauper, Peter Carter, slept in the said township of Latchford, on the night of the said 23d day of December, 1837, as in the said examination stated, he had ceased to serve under the said indenture of apprenticeship, and the same was not a residence in the said township of Latchford while serving under the said indenture.

9. That the said pauper, Peter Carter, slept in the said township of Warrington on the night of the 22d day of the said month of December; and the said night was the last night during the said service; and the same sleeping was a residence while serving under the said indenture, and completed the period of forty days' residence during his service under the said indenture in the said township of Warrington.

10 and 11. Not material here.

On the appeal coming on to be tried, the appellants' counsel applied to

the court to quash the order, alleging that the examinations were insufficient to sustain it, or entitle the respondents to go into evidence, inasmuch as they showed that a settlement by apprenticeship had been gained by the pauper, Peter Carter, either in the township of Latchford or else in the township of Warrington; whereby his birth settlement, mentioned in the examinations, was merged or destroyed. And that the examinations did not show that the said settlement by apprenticeship had been gained in Latchford. The court refused to quash. And the counsel for the respondents, having proved that the pauper, Peter Carter, was born in the township of Latchford, on 24th December, 1816, stated that he should rely on the birth settlement so proved, and closed the respondents' case. Upon which the appellants' counsel applied to the court to quash the order, on the ground that, the respondents having in their examinations averred [*572 an apprenticeship of the pauper Peter Carter, with a service under it, and residence during such service sufficient to confer a settlement either in Latchford or else in Warrington, which apprenticeship was admitted, and which service and residence were not denied in the grounds of appeal, the birth settlement had been superseded or destroyed by the settlement by apprenticeship; and the respondents, having relied on the birth settlement, had failed to support their order. The court ruled against the application, and called on the appellants' counsel to go into their case.

The appellants' counsel then called the pauper Peter Carter, who proved that he had served John Gregory, of Warrington, from 16th February, 1835, until the evening of Saturday, 23d December, 1837. That, during the time he so served, he resided and slept in Latchford in the summer months, and in Warrington in the winter months; and that, during such service, he slept more than forty days in each of those townships. That he slept in Warrington on the night of Friday, 22d December, 1837. That, when he left his master's house in the evening of Saturday, 23d December, 1837, he had resolved not to return to his service under his apprenticeship; and that, for a year previously, he had fully determined to vacate his apprenticeship as soon as by law he should be able to do so.

This being the appellants' case, the counsel for the respondents contended that it failed, inasmuch as no apprenticeship had been proved, the indenture not having been produced or accounted for. The appellants' counsel contended that the valid binding of *the pauper, Peter Carter, to John Gregory, by indenture of which a copy was set out in the examinations, having been averred in the examinations by the respondents, and admitted by the appellants in their fourth ground of appeal, was so admitted for all purposes of the trial; and that the appellants could not be required to prove such binding. The court found that Peter Carter served his apprenticeship with John Gregory, from 16th February, 1835, till 23d December, 1837, and that he slept in Warrington on the night of 22d December, 1837, and had slept and inhabited in Warrington more than forty days while so serving John Gregory under the said indenture and attained his majority [*573

and avoided his apprenticeship on 23d December, in the same year: and that Warrington was the place of his last legal settlement acquired under the said indenture. But the court ruled that the fact of Carter having been bound apprentice to Gregory was not admitted on the examinations and grounds of appeal, so as to render proof thereof by the appellants unnecessary, and therefore confirmed the order, subject to the opinion of the Court of Queen's Bench on the following points.

First, whether the examinations were sufficient to entitle the respondents to go into their case. Secondly, whether the fact of Carter having been bound apprentice to Gregory was not admitted on the examinations and grounds of appeal, so as to render it unnecessary that the appellants should prove the binding. If the court should be of opinion that the examinations were not sufficient to entitle the respondents to go into evidence in support of the order, or if the court should be of opinion that the fact of Peter Carter having been bound apprentice to John Gregory was admitted by the
 *574] examinations and grounds of appeal, so as to render proof of the fact by the appellants unnecessary, then the order was to be quashed: otherwise confirmed.

Crompton in support of the order of sessions. The birth settlement is good, unless something be shown giving a subsequent settlement elsewhere. But that is not done; for no apprenticeship was proved. The respondents were bound to forward all the examinations to the appellants; *Regina v. Outwell*, 9 A. & E. 836: but they do not, by this, admit the truth of all that appears there. The justices were to act upon so much of the evidence as they believed: it may frequently happen that the evidence of one witness is inconsistent with that of another. Indeed, if the respondents had admitted the execution of the indenture, that could not have dispensed with proof of it on the part of the respondents, according to *Call v. Dunning*, 4 East, 53. *Slatterie v. Pooley*, 6 M. & W. 665, may be mentioned on the other side: but that case (admitting its correctness, for the sake of argument) shows, at the utmost, only that an express admission by one of the parties to a cause, as to the contents of a deed, may be given in evidence against him: here the attempt is to conclude the respondents from disputing the execution, (not the contents,) by the mere fact that the justices received evidence of the fact from a third party. There is no ground for presuming that the indenture was stamped.

Pashley, contrâ. *Slatterie v. Pooley* has been recently acted upon in
 *575] *Howard v. Smith*, 3 M. & G. 254: and Lord *TENTERDEN's decision at nisi prius, in *Bloxam v. Elsie*, Ry. & M. 187, is overruled by those two cases. Therefore the only question is, whether the indenture here was admitted by the respondents. Now the parties go to sessions to try only the questions arising on the objections. No question was here raised as to the truth of the depositions in respect of the indenture. [COLLIERIDGE, J. I do not see how you narrow the respondents' case. It would be very hard if they were held to admit the truth of all the allegations in the

depositions which their opponents do not dispute.] The appellants are completely estopped on all such allegations; *Regina v. St. John, Margate*, 1 Q. B. 252. There would be a hardship on them if the estoppel were not mutual. A decision for the respondents in this case would introduce all the uncertainty of the old law. It would be easy for respondents, when they mean to dispute what is alleged in the depositions, to send a notice to that effect. A party using the affidavit of another person makes it evidence against himself on all future occasions; *Brickell v. Hulse*, 7 A. & E. 454.(a) Then the evidence and finding at sessions show that the settlement under the apprenticeship was at Warrington; *Rez v. Ribchester*, 2 M. & S. 135. But, even taking it to be uncertain, under the examinations, whether the pauper slept in Warrington or Latchford on the last night of his service under the apprenticeship, he must have done one or the other, and therefore have gained some settlement by apprenticeship; which is sufficient to put an end to the birth settlement; *Rez v. St. Mary, Beverley*, 1 B. & Ad. 201. The examinations therefore fail to support the [*576 order, as they negative the birth settlement, yet show no other. At any rate they precluded the respondents from relying on the birth settlement. the witness who deposed to the place of birth deposed also to the apprenticeship.

LORD DENMAN, C. J. I have no doubt that the sessions were right in allowing the respondents to go into their case. All the examinations must be sent; and they may contain evidence of many settlements: the justices and the respondents may rely upon that which they believe to be the true one. I own that I am not satisfied on the other point. There ought, I think, to be some way of showing what it is upon which the respondents mean to rely. The appellants ought to know this; and it is very likely that they have been misled in the present instance. I should have liked the case better if they had had the information. But I cannot say that, in point of law, the respondents are bound to furnish it. We must look what it is that the act requires. The examinations are to be sent on one side, the grounds of appeal on the other. If a communication had passed between the attorneys, which led the appellants to expect that a particular settlement would be relied on, and another ground were relied on by the respondents, that perhaps might furnish a fair ground for applying to adjourn the case. But, under the present circumstances, if the appellants rely on one particular head of settlement, they make that their own case.

*WILLIAMS, J. The examinations show two settlements: and why should they not? Why should that preclude the respondents [*577 from relying upon either? As to the other point, the examinations are in no way in the shape of an admission. All must be sent, though the respondents may know of a birth settlement, and not of any settlement arising from the other matter extracted from the deponent. If, then, they are to be bound by all that the deponent says, it will surely be a strange pervers-

(a) See *Gardner v. Moulk*, 10 A. & E. 464; *Cole v. Hadley*, 11 A. & E. 807.

sion of the doctrine of admissions to hold that a statement made by a party himself is to be assimilated to a statement, which he has no opportunity of contradicting, made by another person. Then, unless you take this as an admission made by the respondents, it is no admission in the cause: and, if the appellants seek to extinguish the birth settlement by proof of settlement by apprenticeship, they should come prepared with proof of that settlement.

COLERIDGE, J. The first question is, whether the respondents were precluded by these examinations from going into evidence of the birth settlement. The birth is stated in the examinations: and, if we stop there the objection is answered. But then it is said (and for the sake of the argument we may admit) that the examinations go on, and show an apprenticeship. But, if the justices choose to remove on the birth settlement, what are the respondents to do? Are they to be precluded from acting on what they and the justices believe to be true? They have done nothing: only a witness has proved what may be in many respects an imperfect settlement. As to the other point, I own I do not feel the *difficulty
*578] which is felt by my lord. I wish to see the statute carried out with good faith. But, if we would avoid doubt, we had better do no more than the statute prescribes. The removing parish must send all the examinations: but it cannot be said that they admit what appears there against themselves. The appellants are to send their grounds of objection: but they cannot compel the respondents to admit any part of the examination by selecting a particular fact as the only question to be tried. If they could, they would have nothing to do but to forbear disputing an indenture, and rely upon that for a settlement, disputing only some fact which might be proved against them without destroying the settlement. That may not have been the attempt here made: but such a case might occur.

WIGHTMAN, J. It is argued that the same examination which contains the proof of the birth settlement contains also proof of another settlement which the respondents admit by sending, as they are obliged to do, the whole examination. The argument appears to assume that the examination is the examination of the respondents; whereas they are entitled to deny the truth of what the witnesses say. It is too much to contend that the respondents admit the truth of all they are obliged to send. It seems to me that the sessions have done perfectly right.

Pashley then prayed that the court would simply discharge the rule to quash the order, without affirming the order, as the appellants had gone to trial under a misapprehension as to the settlement which was to be relied upon. Afterwards, (on the same day,)

*579] *Lord DENMAN, C. J., said: we can only discharge the rule for quashing the order of sessions; the order is then confirmed. Stat. 6 G. 2, c. 19, s. 2, prohibits the removal of the judgments or orders of justices unless the party prosecuting the certiorari, "before the allowance thereof, shall enter into a recognisance," "with condition to prosecute the

same" at his own costs, "with effect," and to pay the party or parties, in whose favour and for whose benefit such judgment or order was given or made, within one month after the said judgment or order shall be confirmed, their full costs and charges." The discharge of the rule for quashing does, in effect, confirm the order, within the meaning of the statute. The consequences therefore attach: and it is perfectly understood that those who bring up a case do so at their peril.

Rule for quashing the order of sessions discharged.(a)

(a) The entry of judgment was that the rule nisi for quashing the order of sessions "be now discharged, and the said order of sessions affirmed." See 2 NOL. P. L. 614, (4th ed.)

*The QUEEN v. The Inhabitants of ST. SEPULCHRE. Nov. 20. [1580

A pauper was removed to S. on the examination of P. and A. P. deposed that, on 22d July, 1839, he let to pauper's husband a house in S., "at the rent of 10*l.* per year," that the husband "occupied the house until 22d July, 1841," and paid P. "the whole of the rent during that time." A. deposed that the husband in July, 1839, went to the house, and "resided in that house until March, 1842."

Held, dissentiente COLERIDGE, J., that the sessions were not entitled to affirm the order of removal, the examinations not showing that the house had been occupied for a year under a yearly hiring within stat. 1 W. 4, c. 18, s. 1.

ON appeal against an order of two justices, removing Ann Adams from the parish of Farthingstone to the parish of St. Sepulchre, both in Northamptonshire, the sessions affirmed the order, subject to the opinion of this court on the following case.

The order of removal was grounded on several examinations: the material part of those on which any question arose are the following.

Jacob Putley stated as follows. On 22d July, 1839, I let a house, situate at No. 10, Leicester street, in the parish of St. Sepulchre, in the town of Northampton, to Thomas Adams, the husband of the pauper Ann Adams, at the rent of 10*l.* per year, exclusive of the parochial rates. The said Thomas Adams occupied the house until 22d July, 1841, and paid me the whole of the rent during that time.

Ann Adams (the pauper) stated as follows. In August, 1832, I was married to Thomas Adams, who at that time resided at the parish of Weedon Beck, in the said county. In the month of July, 1839, my said husband and I went to a house No. 10, in Leicester street, in the parish of St. Sepulchre, in the town of Northampton, belonging to Mr. Putley. We resided in that house until March, 1842, when my husband died. I am now chargeable to the parish of Farthingstone.

Amongst other grounds of appeal were the following.

*4th. That the examinations are defective and insufficient, inas- [581
much as it is not therein stated, nor does it appear therefrom, that the said Thomas Adams rented or occupied the house No. 10, in the said examinations mentioned, or any other house or tenement in the said parish, under a yearly hiring.

5th. That it is not stated it the said examinations, nor does it appear therefrom, that the said Thomas Adams ever bona fide rented a tenement in the said parish of St. Sepulchre, at the sum of 10*l.* a year at the least, for the term of one whole year, or that he occupied any such tenement under such yearly hiring, and actually paid the rent for the same to the amount of 10*l.* at least, for the term of one whole year.

6th. That it is not stated in the said examinations, nor does it appear, that the said Thomas Adams resided for forty days or upwards in the said parish of St. Sepulchre, whilst renting and occupying a tenement therein at a yearly rent of 10*l.*

On the trial of the appeal, the foregoing grounds were relied upon. The sessions confirmed the order, subject to the opinion of this court on the objections.

If the court should be of opinion that the court of quarter sessions ought to have given effect to the objections, or either of them, the order of sessions was to be quashed: otherwise to be confirmed.

Macaulay and *A. Mills*, in support of the order of sessions. The first objection is that no inhabitancy for forty days is shown. But the house, according to Putley's evidence, is let on 22d July, 1839; and the lessee occupies it till July, 1841; he went thither in July, 1839, according to Ann Adams's evidence, and "resided" there till March, 1842. The second objection is, that no occupation under a yearly hiring is shown. There is some hiring; and, under that hiring, an occupation and residence of more than two years: from that the justices were entitled to infer a hiring for a year. Further, the letting is "at the rent of ten pounds per year;" and "the whole of the rent" is paid for two years. *Regina v. The Recorder of Pontefract*, 2 Q. B. 548, will be relied upon for the appellants. There the examination stated that the pauper "occupied" a cottage, land and shop at "the yearly rent" of 10*l.* 11*s.* 6*d.*, "all which said premises he occupied for three years." The judges there did certainly express an opinion that the statement was insufficient, because there might have been only a tenancy at will with a payment after the rate of 10*l.* 11*s.* 6*d.* But there a rule for a mandamus, (which was deemed allowable till the contrary was held in *Regina v. Kesteven*, 3 Q. B. 810,) had been obtained by the respondents, who had refused a case offered to them by the sessions. The sessions had held that the statements of fact in the examination were not sufficiently particular. That was a sufficient ground for discharging the rule, and this court declined to interfere: the remarks on the other point must be considered as extra-judicial. Here, however, the landlord says, "I let" the premises "to T. Adams," "at the rent of ten pounds per year;" a statement much more direct than that in *Regina v. The Recorder of Pontefract*. In *Rez v. Herstmonceux*, 7 B. & C. 551, it was held that an agreement "to take a house at twenty guineas a year, the rent to be paid weekly, and either party to be at liberty to give three months' notice from any quarter day, and at the expiration thereof to determine the tenancy, was a

renting for the term of one whole year, under stat. 6 G. 4, c. 57, s. 2. A general occupation at a yearly rent imports a yearly tenancy; *Doe dem. Martin v. Watts*, 7 T. R. 83. It is sufficient if the examination state facts from which the hiring may be implied, though not the hiring itself, as was decided in the case of a hiring and service; *Regina v. Pilkington*, 5 Q. B. 662.(a) No other reasonable use can be made of examinations: they, like all other evidence, contain facts on which those whose province it is to decide must found their own conclusion. Some confusion may perhaps have arisen from the language occasionally used in the discussion of cases upon examinations. The averments and allegations of parties to a record are not analogous to what are called the averments and allegations in examinations. The settlement would be proved at sessions by this evidence if given in a witness box: why are the removing justices precluded from drawing the same inference? If these facts were stated in a case, and, the sessions having affirmed the settlement, it were left to this court whether the facts entitled the sessions to affirm it, the court must hold with the sessions, unless *Regina v. Pilkington* were overruled. Now it would be contradictory to hold that what would entitle the sessions to find the settlement did not entitle the removing justices to find it.

Müller and P. B. Barlow, contra. The occupation is not shown to have been under a yearly hiring. There *might be a yearly hiring, and yet an occupation partly under that and partly under some other hiring, [*584 as in *Rex v. Banbury*, 1 A. & E. 136. It is not shown that the occupation commenced and was continued uninterruptedly from the hiring. No fact essential to the settlement should be left to inference; *Regina v. Stoneleigh*, 2 Q. B. 530; *Regina v. Flockton*, 2 Q. B. 535; *Regina v. Wymondham*, 2 Q. B. 541; *Regina v. Leeds*, 5 Q. B. 907, where *Regina v. The Recorder of Pontefract*, 2 Q. B. 548, was relied upon. These and other cases having laid down the rule so distinctly, it is now a fair inference that an express statement is omitted only where it cannot be truly made. *Rex v. Herstmonceaux*, 7 B. & C. 551, was under the notice of the court in *Regina v. The Recorder of Pontefract*; it shows merely that this court may infer the settlement from the facts if given in evidence at sessions, not that a statement of such facts in an examination is equivalent to a statement of settlement. In *Regina v. Pilkington*, 5 Q. B. 662, all that the examinations omitted was a legal inference from the facts stated, which were really compatible with no other inference; and the sessions there were understood to have drawn the inference; which is not done here. A hiring for as long as both parties please creates only a tenancy at will; *Richardson v. Langridge*, 4 Taunt. 128; though, if other facts appear, as a reservation of yearly rent, an inference of a tenancy from year to year may be raised.

Lord DENMAN, C. J. We are bound to adhere to the former decisions; and they govern this case. By *deciding otherwise, [*585

(a) See *Regina v. St. Olave's*, 5 Q. B. 912.

we should encourage the raising of uncertain questions, which we avoid by refusing to accept a statement of settlement omitting any essential fact.

WILLIAMS, J. The respondents' counsel, though in terms of moderation, urged upon us that we could not carry out the principle, against which they contend, without absurdity. We have certainly laid down the rule that no essential fact shall be taken by inference. We must not, after that, subject ourselves to the imputation of being startled at following out our own doctrine. It seems to me that, in quashing this order of sessions, we are acting consistently with *Regina v. The Recorder of Pontefract*, 2 Q. B. 548. That case has never been overruled. Here the terms of the holding are omitted; and those terms are necessary incidents to a statement of the settlement.

COLERIDGE, J. I feel as desirous as the rest of the court to uphold a strict rule, and adhere to our former decisions. Yet I rather incline to differ from the decision which is to be given in this case. I think it imposes a great difficulty: and I should have felt still more strongly opposed to it, but for the case of *Regina v. The Recorder of Pontefract*. As to that case, however, I shall only say, that it does not appear to me fully to prove the point for which the appellants here contend; and that we are freed from it, as an express authority, by the explanation which Mr. *Macaulay* suggested. And it does seem to me that the examination here contains all the incidents necessary to the *settlement. First, there is a contract of hiring at a
*586] sufficient yearly rent on a given day: then there is a residence and occupation of sufficient length. Then it is stated that "the whole of the rent" is paid to the lessor during the whole time of the occupation. It appears to me that I must in fairness understand this of the rent which has been spoken of before; and then the occupation for which such rent is paid must have been under the original hiring.

WIGHTMAN, J. I agree with my lord and my brother WILLIAMS that the requisites of the statute are not shown by the examination to have been complied with. It has been laid down on many occasions that no necessary incident of a settlement is to be taken by way of inference. An examination is insufficient which states only facts consistent with a non-fulfilment of the statutory requisites. Now the statute lays down that no settlement of this class shall be gained unless the house, &c., be actually occupied under a yearly hiring for one whole year. I need not determine whether there is here a yearly hiring: the difficulty with me is to find a statement of an actual occupation under such yearly hiring. The occupation here may have been under such yearly hiring; but, consistently with the examination, it may have been not so.

Order of sessions quashed.

*PHILIPSON, Public Officer, v. The Earl of EGREMONT. [*587
Nov. 25.

Scire facias. Declaration, that plaintiff, as public officer of a banking company, under stat. 7 G. 4, c. 46, recovered in the original action against B., as the registered officer of a steam-packet company to which letters patent had been granted under stat. 7 W. 4, & 1 Vict. c. 73, damages by reason of the non-performance of a promise of the steam-packet company, and costs; that plaintiff was still one of the public officers of the banking company; and that, although judgment had been given, execution of the damages still remained to be made; that the defendant in the *sci. fa.* at the time of the making the promise, and from thence until and at the giving of the judgment, was, and thence hitherto hath been, and still is, a member of the packet company. *Held*, that the declaration was not bad for not showing whether the letters patent contained any declaration, under stat. 7 W. 4, & 1 Vict. c. 73, s. 4, limiting the liability of defendant in the *sci. fa.* to any, or to what, extent; such limitation, if any existed, being matter that ought to be pleaded by defendant; and that the declaration alleging that defendant was a member when the promise was made, showed sufficiently that he was a member when the cause of action accrued.

Plea 3, that defendant was not, at the time of the commencement of the original action, liable thereto, as an existing or a former member of the packet company; concluding to the country. *Held* bad, on special demurrer, as not taking issue on any matter alleged in the declaration, and yet concluding to the country.

Plea 4, that the packet company was not formed by any deed of partnership, &c., in compliance with stat. 7 W. 4, & 1 Vict. c. 73: verification. *Held* bad, on special demurrer, as setting up a defence which might have been pleaded to the original action.

Plea 5, that the original action was for a demand in respect of which neither the defendant in the *sci. fa.*, the packet company, nor the defendant in the original action as such registered officer, was by law liable, as plaintiff at the commencement of the action well knew; and that, the registered officer of the packet company and the plaintiff well knowing the premises, the registered officer of the packet company fraudulently and deceitfully, and by connivance with plaintiff, suffered the judgment in order to charge defendant in the *sci. fa.*: verification. *Held* that the plea was good, as containing a sufficient allegation of fraud and collusion between plaintiff and the nominal defendant in the original action; and that the defendant in the *sci. fa.* was entitled to avail himself of such defence by plea.

Semble, that defendant might have availed himself of that defence by motion to set aside the judgment.

Plea 6, setting out the record of the original judgment, which was in an action of assumpsit by endorsee against drawer on a bill of exchange drawn and endorsed by B. as the agent of the packet company, that B. did not, as agent of defendant, draw or endorse the bill, nor did defendant ever ratify the drawing or endorsing thereof; verification. *Held* bad, on special demurrer, because the defence might have been pleaded to the original action.

SCIRE FACIAS. The declaration set forth the writ, which alleged that R. P. Philipson, (the plaintiff,) as one of the registered public officers of the Northumberland and Durham District Banking Company, according to the form of the statute, &c., 7 G. 4, c. 46, recovered "against J. Bleaden, then being the secretary and one of the registered officers of a certain trading company called the *Commercial Steam Packet Company, whose principal place of carrying on business was and is situate in [*588 that part of the United Kingdom," &c., "called England, and which said J. Bleaden, according to our letters patent, under the great seal, granted to the said company, and according to the statute made and passed," &c., (a)

(a) Stat. 7 W. 4, & 1 Vict. c. 73, "For better enabling her majesty to confer certain powers and immunities on trading and other companies."

Sec. 2 enacts "That it shall and may be lawful for her majesty," &c., "by letters patent to be from time to time for that purpose issued under the great seal," &c., "to grant to any company or body of persons associated together for any trading or other purposes whatsoever, and to the heirs," &c., "of any such persons, although not incorporated by such letters patent, any

"had been and was duly appointed and returned to the enrolment
 *office of the Court of Chancery in England, and registered, as
 *589] one of the officers of the said Commercial Steam Packet Company

privilege or privileges which, according to the rules of the common law it would be competent to her majesty," &c., "to grant to any such company," &c., "in and by any charter of incorporation."

Section 3 enacts "That in any such letters patent," &c., "it shall and may be lawful, in and by such letters patent, either expressly or by general or special reference to this act, to provide and declare that all suits and proceedings, whether at law, in equity, or in bankruptcy, or sequestration, or otherwise howsoever," &c., "against any person or persons, whether bodies politic or others, and whether members or not of such company or body, shall be commenced and prosecuted in the name of one of the two officers for the time being to be appointed to sue and be sued on behalf of such company or body and registered in pursuance of the directions of such appointment and registration respectively hereinafter contained; and that all suits and proceedings, whether at law or in equity, by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such company or body, against such company or body, shall be commenced and prosecuted against one of such officers, or if there shall be no such officer for the time being, then against any member of such company or body;" proviso as to joining members as defendants in equity.

Section 4 enacts "That it shall and may be lawful, in and by such letters patent," &c., "to declare and provide that the members of such company or body," &c., "shall be individually liable in their persons and property for the debts, contracts, engagements, and liabilities of such company or body to such extent only per share as shall be declared and limited in and by such letters patent; and the members of such company or body shall accordingly be individually liable for such debts," &c., "respectively to such extent only per share as in such letters patent shall be declared and limited; such liability nevertheless to be enforced in such manner and subject to such provisions as are hereinafter contained."

Section 5 enacts "that every such company," &c., "shall be entered into or formed by a deed of partnership or association, or an agreement in writing of that nature; and the undertaking shall by such deed or agreement be divided into a certain number of shares to be there specified; and in such deed or agreement, or in some schedule thereto, there shall be set forth the name or style of the said company or body, the names or styles of the members of the said company or body, the date of the commencement thereof, the business or purpose for which the said company or body is formed, and the principal or only place of carrying on such business; and in such deed or agreement there shall also be contained the appointment of two or more officers to sue or be sued on behalf of such company or body in manner hereinafter mentioned."

Sections 6, 7, 8, 10, contain provisions requiring returns to be made to one of the offices for enrolment, of the date of the grant, the name or style of the company or body, and other particulars; also of the names and descriptions of the officers appointed to sue and be sued; changes of name or place of business; changes of members, transfers, &c.

Section 11 enacts "That where the extent per share of the liability of the individual members of any such company or body shall have been limited by letters patent as aforesaid, it shall be lawful for any person who shall or may from time to time have advanced or paid any sum in consequence or by virtue of any execution," &c., "in respect of any share in such company or body, under any judgment," &c., "to be obtained against any officer," &c., "in manner hereinafter mentioned, to make a return thereof to such office as aforesaid in the form," &c.

Sections 20, 21, provide that no person becoming a member shall be entitled to share in the profits, and any person ceasing to be a member shall continue liable as a member, until a return of the transfer, &c., shall be registered.

Section 24 enacts "That all judgments," &c., "obtained in any such actions, suits, or other proceedings as aforesaid against such officer or member in manner aforesaid, whether such member or officer respectively be party to such actions," &c., "as plaintiff, pursuer, petitioner, or defendant or defender, shall have the same effect against the property and effects of such company or body, and also (to the extent hereinafter mentioned) against the persons, property, and effects of the individual existing or former members thereof respectively, as if such judgments," &c., "had been obtained against such company or body in suits or proceedings to which all the persons liable as existing or former members of such company or body had been parties, and that execution," &c., "shall be issued thereon accordingly: provided nevertheless, that where the extent per share of the liability of the individual members shall have been limited by any letters patent as aforesaid, no such execution or diligence shall be issued against any such individual existing and former member of such company or body as aforesaid for a greater sum than the residue, if any, of the amount for which, by virtue of such letters patent as aforesaid

to sue and be sued on behalf of the said *Commercial Steam Packet Company, the sum of 777l. 16s., for the damages which [*590 the said Northumberland and Durham District Banking Company had sustained, as well on the occasion of the not performing a certain promise then lately made by the said Commercial Steam Packet Company to the said Northumberland and Durham District Banking Company as for the costs, &c., whereof the said J. Bleaden, as the secretary and one of the registered officers, &c. is convicted, &c.," prout patet, &c. "And now, on behalf of the said R. P. Philipson and of the said Northumberland and Durham District Banking Company, in our same court, we are informed that the said R. P. Philipson remains and is one of the public officers of the said Northumberland and Durham District Banking Company, and named, appointed and registered as aforesaid, and, although judgment has been given as aforesaid, yet execution of the damages aforesaid still *re- [*591 mains to be made. And, on behalf of the said R. Philipson and of the said Northumberland and Durham District Banking Company, in our same court, we are further informed that the Right Hon. George Earl of Egremont, at the time of the making of the said promise, for the not performing whereof the said damages were recovered as aforesaid, and from thence until and at the giving of the said judgment, was, and thence hitherto has been, and still is, a member of the said Commercial Steam Packet Company: wherefore," &c.

Third plea. That plaintiff ought not to have execution against defendant of the damages aforesaid, because he says that he was not, at the time of the commencement of the action in which the said judgment was so recovered by plaintiff against the said John Bleaden as aforesaid, liable thereto as an existing or a former member of the said company. Conclusion to the country.

Fourth plea. That the said Commercial Steam Packet Company was not, according to the statute, &c., entered into or formed by any deed of partnership or association, or any agreement in writing of that nature, whereby the undertaking was divided into a certain number of shares there specified, and in which or in any schedule to which was set forth the name or style of the said company or body, or names or styles of the members of the said company or body, the date of the commencement thereof, the business or purpose for which the said company or body was formed, and the principal or only place for carrying on such business, and containing the appointment of two or more officers to sue or be sued on behalf of such company or body, *as mentioned in that behalf in the said statute [*592 in that case made and provided. Verification.

said, such individual member shall be liable in respect of the share or shares then or theretofore held by him in the said company or body, after deducting therefrom the amount, if any, which shall appear by such register as aforesaid to have been advanced and paid in respect of such shares or any of them by himself or herself, or any previous or subsequent holder of the same shares or any of them, or the representatives of any such holder, under or by virtue of any former execution or diligence, and not repaid at the time of issuing such subsequent execution or diligence."

Fifth plea. That the action in which the said judgment was so recovered by plaintiff against John Bleaden, as in the declaration mentioned, was brought for and in respect of a certain demand for and in respect of which defendant was not, nor was the said company, nor the said John Bleaden as such registered officer of the said company as in the declaration mentioned, by law liable, as the said John Bleaden and the plaintiff, at the time of the commencement of the said action, well knew. That, the said John Bleaden and the plaintiff well knowing the premises, the said John Bleaden did afterwards, to wit on the day and year in that behalf aforesaid, fraudulently and deceitfully, and by connivance with the said plaintiff, suffer and allow the said judgment to be recovered, and the plaintiff did then recover the same, against the said John Bleaden, in order and with intent and purpose that the said plaintiff might thereupon commence an action against, and obtain payment of the amount thereof, from this defendant. Verification.

The sixth plea set out the record of the judgment against Bleaden, verbatim, commencing "Pleas, &c." It was a judgment by nil dicit on a declaration in assumpsit in the common form by Philipson, as public officer, against Bleaden, on a bill of exchange for 1000*l.* drawn by A. D. Bosson the agent of the Commercial Steam Packet Company, and endorsed by him to T. F. Marrico, and by Marrico to the Northumberland and Durham District Banking Company; prout patet, &c. The plea then stated that Bosson did not, as agent of him, the defendant, or by his authority, make or endorse the said bill of exchange in the said record mentioned: *593] nor did the defendant ever ratify, confirm, or approve of, the said drawing or endorsing the said bill of exchange as aforesaid. Verification.

The plaintiff demurred specially to each of these pleas.

To the third, as amounting to Nil debet, and including defences available in the original action, and because the word "liable" was uncertain in its meaning.

To the fourth and fifth, for the above reasons, and, to the fifth, also for not showing that the plaintiff was party to any fraud.

To the sixth, because it amounted, if to any thing, to an argumentative plea of *nul tiel record*.

Joinder in demurrer.

The defendant, in the points stated by him for argument, submitted that the declaration was bad for not following the words of stat. 7 W. 4, & 1 Vict. c. 73, or showing the defendant's liability within the meaning of that act, but only showing that the defendant was a member of the Commercial Steam Packet Company at the time of the making the promise sued on in the original action; which might well be, and yet he might not have been liable to the original suit within the meaning of the statute: and for not showing that the defendant's liability was not limited by the letters patent, nor to what extent it was limited; and for not showing that the company was established in conformity with the statute in other respects;

and also because, according to the statute, a scire facias would not lie against an individual member on a judgment against the company.

The case was argued in last Trinity term. (a)

**W. H. Watson* for the plaintiff. The Commercial Steam Packet Company is an unincorporated company, to which the queen has, [*594 under stat. 7 W. 4, & 1 Vict. c. 73, s. 2, granted privileges by letters patent, with a provision, as required by sect. 3, that suits and proceedings against the company shall be commenced and prosecuted against one of the two officers for the time being to be appointed to sue and be sued on behalf of such company. By sect. 4, there may be inserted in the letters patent a declaration restricting the individual liability of members of the company: but it is assumed throughout the act that, if the letters patent contain no such restriction, each member continues individually subject to all the liabilities of the company. Sect. 5 requires a deed of partnership to be entered into; but it does not distinctly appear whether such deed is or is not a condition precedent to the granting of the letters patent, and, so far as regards the case now before the court, that question is immaterial. Sections 6, 7, 8, 10, require certain returns to be made of the granting of the letters patent, the style of the company, the names of members, changes of name, transfers, &c. By sect. 21 a person ceasing to be a member is to be considered as continuing a member until a return of the fact shall have been registered. By sect. 24 all judgments obtained in such actions against such officer shall have the same effect against the persons, property and effects of the individual existing or former members as if such judgments had been obtained against such company in suits or proceedings to which all the persons liable as existing or former members had been parties; and execution shall be issued accordingly. In the present case judgment against the *company has been obtained in an action against the secretary, [*595 one of the officers appointed under the statute to sue and to be sued on behalf of the company. It is clear that the proper mode of proceeding to execution against an individual member is by scire facias. But certain objections are taken to the declaration in scire facias which, it is said, does not show the liability of the defendant. It shows the formation of the company by letters patent under the statute, and a regular judgment against one of the officers appointed for the purpose of suing and being sued on behalf of the company, and that the defendant, at the time of the making of the promise, was, and ever since has been, and still is, a member of the company, so that no question arises as to any restrictions on the liability of former members: the secretary represents all the parties liable, whoever they may be; and the defendant is in any point of view one of such parties. It is also suggested, on the part of the defendant, that the declaration ought to have shown whether the letters patent contain any declaration limiting the liability of individual members, and the extent of any such limitation; but those are matters more in the knowledge of the defendant than of the

(a) Friday, May 31st. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

plaintiff, and are introduced into the statute (sect. 4,) by way of subsequent proviso; such matters ought, in either point of view, to be pleaded by the party who seeks to relieve himself from the liability to pay more than a limited amount.

The third plea neither denies nor confesses and avoids any matter previously alleged by the plaintiff. The averment in the declaration, that the defendant was a member when the promise was made, is met by an allegation that he was not at the commencement of the action liable as an existing or former member: such *a traverse would be supported, not
 *596] merely by disproving the original liability, but by proof of a release, payment to the extent of limited liability, or any other answer which ought to be specially pleaded.

The fourth plea denies that the company was formed by deed or agreement in writing so as to comply with sect. 5 of the statute. The declaration in *scire facias* alleges the formation of the company, and that Bleaden is enrolled as the officer to sue and be sued: it is no answer to say that the company have committed a fraud on the crown or the public, or have omitted to do something which they ought to have done. The judgment establishes the fact of the company being a company within the act, including therefore the existence of such instruments as are essential to that fact. And, if such an omission could afford any defence, it might have been pleaded in the original action, and therefore cannot be pleaded to the *scire facias*; *Bradley v. Eyre*, 11 M. & W. 432; (a) *Bradley v. Urquhart*, 11 M. & W. 456.

The fifth plea states that the company and Bleaden were not liable in the original action, but that Bleaden suffered judgment by connivance with the plaintiff in order to charge the present defendant. The fraud is imputed not to the plaintiff, but to the defendant's own officer. [COLERIDGE, J. The plea alleges a common knowledge by the two that the company and its officer were not liable, and states that each performed his part.] But the plaintiff himself was only a nominal party, as the public officer of another
 *597] company. [PATTESON, J. *Your special demurrer does not point to any distinction between the fraud of the public officer and the fraud of his company. It is difficult to say whether the word "plaintiff" means the company or the nominal plaintiff.] If it is to be construed as including the company for which he sues, the special demurrer names the company; if the word "plaintiff" means only the nominal plaintiff, there is no charge of fraud against the company; that is ground of general demurrer. At all events, it is not sufficient to charge them with "connivance," a word of no legal meaning, and not equivalent to the established legal phrase "fraud and covin." [COLERIDGE, J. There is a sufficient allegation of knowledge.] The expression *not by law liable* comprises many grounds of defence which there could be no impropriety in disregarding,

(a) See *Baylis v. Hayward*, 4 A. & E. 258; note (8) to *Wheatley v. Lane*, 1 Wm. Saund. 219 c, d; note (4) and note (1) to *Underhill v. Devereux*, 2 Wm. Saund. 72 d d.

such as the statute of limitations, a defect of stamp, or any other defence which they might think a defendant too honest to set up. If issue were joined on this plea, the defendant would insist at nisi prius that he undertakes to prove nothing but the dishonesty of Bleaden; a plaintiff may honestly bring an action against a public officer, and the public officer may fraudulently omit to defend it; but that does not make the plaintiff's conduct dishonest.

But the question of fraud is, at the present stage, wholly immaterial: the proper mode of taking advantage of any such fraud is by motion to set aside the judgment; *Bosanquet v. Graham*.(a) PARKE, B., says, in *Bradley v. Eyre*, 11 M. & W. 450, "If the nominal party collusively suffers judgment to be entered against him, and the shareholders *are taken by surprise, they should apply to the court to set aside the proceed- [*598 ings." Again, in *Bradley v. Urquhart*, 11 M. & W. 460, PARKE, B., says, "I do not, however, say that a scire facias of this description cannot, under any circumstances, be impeached; no doubt it may on the ground of fraud, but in that case the proper course might, perhaps, be to apply to the court to set aside the writ." But, if such a defence is permitted to be made the subject of a plea, it will in effect be a plea that the judgment is null and void, which would manifestly be bad. [COLERIDGE, J. It might be good as between the actual parties, against Bleaden as a shareholder.] The statute does not require that the officer shall be a shareholder: and a judgment cannot be good for one purpose and not for another: here the judgment, if good at all, is good against the company at large; *Whittenbury v. Law*, 6 New Ca. 345. The sixth plea is merely an argumentative denial of the liability of the company, which could be disputed only in the original action: if Bleaden was not the agent of the defendant, he was not the agent of the company.

Erle, (with whom was *J. W. Smith*), contra. The cases that have been cited as decisions of the Court of Exchequer arose under a local and personal (public) act, (4 & 5 Vict. c. lxxxix.) the present case arises under a general act; and a party who declares under that act must bring the case within its provisions. For purposes of suing and being sued the company are virtually invested with the attributes of a corporation; *and an [*599 individual corporator is not liable by any ordinary course of law. A compliance with sect. 5 is, therefore, essential, as will be seen still more clearly if that section be construed in connection with the provisions as to transfers: the deed is a condition precedent to the liability of the original parties, just as the liability of a transferee does not begin, and the liability of a transferor does not end, until the return of the transfer is enrolled. Should it be held that the execution of a solemn instrument of partnership is not necessary, a person may be found to be a partner on evidence of some mere voluntary contribution. Besides, the liability may be limited; and the party who seeks to avail himself of the liability ought to show how

(a) Trin. T. 1843, see p. 601, note (a), post.

far it extends. That liability is very different from the common law liability of partners; for it extends to all who are partners at the time of the judgment, and is not confined to such as were partners at the time of the contract: but sect. 24 makes existing or former members individually liable only "to the extent hereinafter mentioned," so that the restrictions on such liability are imported into the enacting part, and do not first appear by way of proviso. The declaration is also defective, so far as regards any liability of the defendant at common law, for not showing that the defendant was a member at the time when the original cause of action arose; that is not necessarily the time when the promise was made. Suppose ordinary banking transactions to have taken place in the year 1840, a new partner to have come into the bank in 1841, and an account of those transactions to be stated in 1842: that account would not bind the new partner; nevertheless the promise is made after he *has become a partner. The declaration *600] therefore does not show the defendant to be liable either at common law or under the statute.

The fourth plea distinctly negatives the existence of a deed of partnership, which, by sect. 5, is made a condition precedent, and, by sect. 6, must be returned to one of the offices for enrolment. [PATTESON, J. The declaration alleges that the appointment of officers was returned to the office for enrolment. In returning such an appointment, the company in effect returned that there was a proper deed: if there was no deed, the company committed a great fraud. You do not traverse the allegation that a return was made.] The defendant is now seeking to resist the fraud; but he could not by merely traversing the return compel the production of the deed. Wherever a party seeks the aid of a statute, he must show that the statute has been complied with; *Christie v. Unwin*, 11 A. & E. 373. The same reasoning applies to the omission to show whether the letters patent restricted the liability of individual members; the proviso, being distinctly referred to in the enactment, operates by way of exception, and must be negatived. [PATTESON, J. It is not clear that any scire facias is necessary: the execution is to go as if the judgment had been obtained in a suit to which all the persons liable as existing or former members had been parties. But why are we to presume that there was a limitation? The crown is not bound to insert one in the letters patent. The defendant might have pleaded it affirmatively: the plea that he is not liable as a member is like a negative *601] pregnant.] It was *necessary to make the denial comprise the whole class that may be held to be liable: it is intended to put the plaintiff to the same proof as was required in *Bosanquet v. Graham*, Q. B. Trin. T. 1843, 7 Jurist, 832, in which case the court directed an issue to try the very question which the defendant here is attempting to raise.(a)

(a) *Bosanquet v. Graham*, was the title of the cause in which judgment on a warrant of attorney was entered up against the public officer of The Southern District Bank, as stated in *Bosanquet v. Woodford*, (5 Q. B. 310.) The plaintiffs, The London and Westminster Bank, obtained writs of sci. fa., under stat. 7 G. 4, c. 46, against Bridger and Lancaster, who were alleged to be shareholders in The Southern District Bank. Bridger and Lancaster respectively ob-

The defence set up by the fourth plea has already been adverted to as an objection to the declaration. In *Bradley v. Eyre*, 11 M. & W. 432, 450, the court, in deciding against the plea that no memorial was enrolled within six months, proceeded on the ground that the *memorial referred to in that plea was not a condition precedent. Though a plea that [*602 there was no deed of partnership would have been a good answer to the original action, that can be no reason why in a proceeding like this, where the defendant is substantially a third party, he should not be permitted to show that the company never existed.

As to the fifth plea. A judgment may be impeached on the ground of fraud, *Imray v. Magnay*, 11 M. & W. 267. [PATTESON, J. The statute makes the defendant a party to the judgment: the scire facias is only for execution: he is therefore setting up his own fraud. Suppose an agent under a general power of attorney were to suffer a collusive judgment under it against his principal: the principal might have some remedy; but I doubt whether he could be heard to plead that the judgment was fraudulent.] There the principal is the party on the record; but, in the class of cases which have decided that the proceeding to charge an individual partner in certain companies must be by scire facias and not by suggestion, it seems to be contemplated that he is a stranger to the judgment: the defendant therefore here contends that the plaintiff cannot make him a party to a judgment fraudulently obtained, and that he has a right to plead the fraud, and is not confined to an application to the discretion of the court.

W. H. Watson in reply. Any restriction on the liability of individual members is created by a declaration in the letters patent: and the plaintiff does not know enough of them to be able to plead it without great risk of variance: if that were necessary, it would be *necessary also for [*603 the plaintiff to plead any payments by defendant that may have been enrolled under sect. 11. But, notwithstanding the reference in the earlier part of sect. 24 to the subsequent restriction, that restriction is substantially by way of proviso, and lying more in the knowledge of the defendant than

tained rules to show cause why the writs of sci. fa. should not be set aside; and also for setting aside the judgment and warrant of attorney, on the grounds, among others, that the warrant of attorney had been given collusively, and that Graham was not the public officer of The Southern District Bank. Bridger's rule was argued November 24th, 1846, before Lord Denman, C. J., Williams, and Coleridge, Js., Sir W. W. Follett, Erle, and Butt showing cause, and Thesiger and Ogle supporting the rule. The court held the sci. fa. in this case to be void: as to the judgment, *Cur. adv. vult.* Lancaster's rule was argued June 14th, 1843, before Lord Denman, C. J., Patteson, and Williams, Js., by the same counsel respectively, and Kelly, with Thesiger and Ogle. *Fowler v. Rickerby*, (2 Man. & G. 760, S. C. 3 Scott, N. S. 138,) was cited as showing that the matter now alleged could not without great difficulty, if at all, be pleaded to a sci. fa. *Cur. adv. vult.* Lord Denman, C. J., in Trinity vacation, June 23d, 1843, delivered the judgment of the court, and said that the matters stated as ground for the rules were such as the court could not try on affidavit, but ought to be tried by a jury: and the court directed that, for their information, certain issues, which they specified, should be raised between the parties, and tried, the rule to be enlarged in the mean time. His lordship in the course of the judgment said that *Fowler v. Rickerby*, had been cited as showing that collusion could not be pleaded to the sci. fa.; but he added that the court did not put that construction on the words of Tindal, C. J.

of the plaintiff: the defendant, therefore, ought to plead it: *Com. Dig. Pleader*, (C 81.) The plaintiff asks only for execution; he does not say for how much; that may vary according to circumstances of which he has no knowledge.

Cur. adv. vult.

The judgment of the court was this day pronounced by

Lord DENMAN, C. J., who, after stating the nature of the case, proceeded as follows. The company was formed under letters patent granted under the provisions of stat. 7 W. 4, & 1 Vict. c. 73. The first objection to the declaration was, that it did not allege to what extent the defendant was liable by the letters patent, or whether his liability was, in any respect, limited by them, according to the power given by the fourth section of the act, the execution being, in such case, limited also by the twenty-fourth section. We are clearly of opinion that, if there be any such limitation, it should be stated by way of plea, by the defendant, and that it was unnecessary for the plaintiff to notice it at all.

The next objection was, that the declaration does not show the defendant to have been a member of the company when the cause of action accrued, but only when the promise was made; the answer is, that, this being an action of assumpsit, the promise is the legal cause of action.

*604] But the third plea is here set up, which alleges that the defendant was not, at the commencement of the suit, liable as an existing or former member of the company. This plea is founded also on sect. 24: but it is bad, because it concludes to the country, though it does not deny any allegation in the declaration. The declaration alleges that the defendant, at the time of the promise, and from thence until and at the giving of the judgment, was, and from thence hitherto has been, and still is, a member of the company. The plea does not deny his so being a member, but states that at the commencement of the suit he was not liable as a member, which is clearly no issue, and is argumentative and bad.

The next objection was raised by the fourth plea, which is founded on sect. 5 of the act: it is sufficient to say that the matter of this plea might have been pleaded to the action itself, and therefore is clearly not admissible in the present stage of the proceedings. The principle has been settled long ago, and was fully supported in *Bradley v. Eyre*, 11 M. & W. 432, and several cases immediately following.

The same answer disposes of the objection raised by the sixth plea.

The fifth plea alleges that the judgment was recovered in respect of a demand for which the company were not by law liable; that, Bleaden (the officer sued) and the plaintiff well knowing the premises, Bleaden fraudulently and deceitfully, by connivance with the plaintiff, suffered judgment to be recovered in order to charge the defendant. Now, so far as this plea states that the company had a defence to the action, it is open to the same answer as the fourth and sixth, *namely that the defence should
*605] have been pleaded to the original action. It was suggested, for

the plaintiff, that possibly such defence may have been the Statute of Limitations, or the Statute of Frauds, or any other technical defence, not touching the merits of the case, and which might have been most honestly waived; and doubtless such a state of things would be consistent with the allegations of the plea: but the gist of the plea is, that, the company not being liable by law, Bleaden fraudulently and deceitfully, and by connivance with the plaintiff, suffered the judgment, in order to charge the defendant. Now, if these allegations be true, the defendant certainly ought to have some remedy; and the question is, whether that remedy is by pleading as he has done, or by motion to the court. We are far from saying that the latter course was not open to the defendant. Fraud, no doubt, vitiates every thing; and the court, upon being satisfied of such fraud, has a power to vacate, and would vacate, its own judgment, as is suggested in *Bradley v. Eyre*, 11 M. & W. 450. But still such a plea as the present may be good: and indeed we find, in *Fowler v. Rickerby*, 2 M. & G. 760, that TINDAL, C. J., stated that it would be good. If the plea had alleged a fraud practised on the original defendant, it would have been open to the answer already made to the fourth and sixth pleas: but, as it alleges fraud and collusion between the plaintiff and the defendant in the action for the purpose of charging the present defendant, there was no opportunity for him to plead it before. We are of opinion that such fraud and collusion are sufficiently stated by the fifth plea: and the question of fact is thereby raised *which is properly within the province of a jury to determine.

We were reminded, on the argument, that, when such questions of [*606 fact have arisen on motion to set aside proceedings by scire facias on a similar judgment, we have directed issues to try the facts, rather than determine them ourselves on affidavit; *Bosanquet v. Graham*; (a) which furnishes an additional argument to show that such facts may be pleaded, if there be the opportunity to do so.

Upon the whole, therefore, we think that our judgment must be for the defendant on the fifth plea, and for the plaintiff upon the others.

Judgment for plaintiff on the third, fourth, and sixth pleas:
for defendant on the fifth plea.

(a) *Ante*, p. 601, note (a).

YOUNG v. HICHENS. Nov. 21.

Plaintiff, while fishing for pilchards, had nearly encompassed the fish with a net; but defendant, by rowing his boat to the opening, disturbed the fish and prevented the capture. Plaintiff brought trespass; and, issues being joined, 1. on plaintiff's possession of the fish: 2. on the fish being plaintiff's, in manner, &c.: *Held*, that he was not entitled to recover; no special custom of the fishery being proved.

In ordinary cases the court will not grant leave to a plaintiff to discontinue, where a verdict has been found against him and is not special. Assuming that under peculiar circumstances the court would grant such leave, they will not do so if there has been a delay, not suffi-

ciently accounted for. As where a verdict for plaintiff was set aside on motion in Hilary term, and the verdict entered for defendant, and the plaintiff moved in Trinity term to discontinue, without any explanatory affidavit.

TRESPASS. The first count charged that defendant, with force, &c., seized and disturbed a fishing sean and net of plaintiff, thrown into the sea for fish, wherein plaintiff had taken and inclosed, and then held inclosed in his own possession, a large number of fish, to wit, &c., and that defendant threw another fishing sean and net within and upon plaintiff's sean and net, *and for a long time, to wit, &c., prevented plaintiff from taking the fish, so taken and inclosed, out of his sean and net, as he could otherwise have done; and drove, &c. the fish; whereby part of them died, part were injured, and part escaped; and the sean and net was injured. Second count, that defendant with force, &c., seized, took, and converted fish of plaintiff.

Pleas. 1. Not guilty. Issue thereon.

2. To the first count, as to preventing plaintiff from taking the fish alleged to be inclosed in his possession, and driving, &c., the said fish; that the fish were not plaintiff's fish, and he was not possessed of them, in manner, &c.: conclusion to the country. Issue thereon.

3. To the second count, that the fish were not the plaintiff's fish, in manner, &c.: conclusion to the country. Issue thereon.

4 and 5. As to other parts of the declaration, raising defences under statutes 16 G. 3, c. 36, and 4 & 5 Vict. c. lvii. (local and personal, public,) relating to the St. Ives (Cornwall) pilchard fishery. Issues of fact were tendered and joined on those pleas.

On the trial, before *Atcherley*, serjeant, at the Cornwall Spring assizes, 1843, it appeared that the plaintiff had drawn his net partially round the fish in question, leaving a space of about seven fathoms open, which he was about to close with a stop net; that two boats, belonging to the plaintiff, were stationed at the opening, and splashing the water about, for the purpose of terrifying the fish from passing through the opening: and that, at this time, the defendant rowed his boat up to the opening, and the disturbance, and taking of the fish, complained of, took place. The learned serjeant left to the jury the question of fact whether the fish *were at that time in the plaintiff's possession, and also other questions of fact on the other issues. Verdict for plaintiff on all the issues, with damages separately assessed, namely, 568*l.* for the value of the fish, and 1*l.* for the damage done to the net. Leave was given to move as after mentioned. In Easter term, 1843, *Crowder* obtained a rule nisi for entering a verdict for defendant on all the issues, or on the 2d, 3d, 4th and 5th, or for reducing the damages to 20*s.* and entering a verdict for defendant on the 2d and 3d issues; or for a new trial; or for arresting the judgment. In Hilary vacation, (February 10th,) 1844,

Cockburn and *Montague Smith* showed cause. The second and third issues raised questions of fact. The jury were justified in finding as they

did, unless it be legally impossible for a man to have possession of a wild animal which is not in his actual occupation. On the motion for the rule, Bracton, f. 8 b, lib. 2, c. 1, s. 3, was cited. He says: "Item continet occupatio piscationem, venationem et apprehensionem. Et nec sola persecutio facit rem esse meam. Nam etsi feram bestiam vulneraverim ita ut capi possit, non tamen est mea nisi eam cepero, imo erit potius occupantis, quia multa accidere solent ne capiam." But there "occupatio" is not confined to corporal possession: a control is sufficient. The doctrine appears to be taken from Just. Inst. lib. 2, tit. 1, s. 12, where the law is thus laid down. "Feræ igitur bestiæ, et volucres, et pisces, et omnia animalia, quæ mari, cælo et terrâ nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt." "Quicquid autem eorum ceperis, eousque tuum esse intelligitur, donec tuâ custodiâ coercetur." *The last words are adopted in the Digest, lib. 41, tit. 1, s. 3, § 2. The [609 *custodia* is not to be construed strictly. In the Greenland whale fishery the custom regulates this. According to *Littledale v. Scaith*, 1 Taunt. 243, note (a), recognised in *Fennings v. Lord Grenville*, 1 Taunt. 241, the first striker of a whale does not acquire the property if the line break; and another party may then take the whale: but in *Hogarth v. Jackson*, 1 Moo. & M. 58, the custom proved was that, if the fish remained entangled in the line, and the line in the power of the striker, although the harpoon was detached, the whale still was in the possession of the striker; and BEST, C. J., considered this a more reasonable custom than that stated in *Littledale v. Scaith*, if it were understood as extending "to all cases where the whale was so far entangled in the rope of the first strikers, that they might thereby have a reasonable expectation of securing her." BAYLEY, J., in *Skinner v. Chapman*, Moo. & M. 59, note, appears to have held, without reference to custom, that, if the fish be harpooned and the line attached, a party who causes the liberation of the fish cannot appropriate it. In *Churchward v. Studdy*, 14 East, 249, a question arose as to the time at which a hunted hare became the property of the hunter: but no decision was given, the fact turning out to be that the hare had been finally captured for the use of the hunter. In Bell's *Principles of the Law of Scotland*, p. 477, 4th ed., under the head of *Occupancy*, the principle is laid down as follows, (s. 1289.) "The act of appropriation is effectual to vest the property only when complete. But it is held complete while fairly proceeding towards full accomplishment. So, if *one wound an animal to death, or so that it cannot escape, [610 or if one, without wounding it, have an animal in pursuit, and not beyond reach, another coming in and taking the animal does not deprive the first of his right—the first being deemed the lawful occupant. In whale-fishing, an important branch of national industry, this general principle is not found to answer all the exigencies of the situation; and particular rules are established." The author then refers to some Scotch authorities, and to the English authorities before cited; and to Stair's Inst., p. 199, 4th ed., book 2, tit. 1, s. 33. Stair lays down the principle as follows. "It is the

first seizure that introduceth property, and not the first attempt and prosecution ; as he who pursueth or woundeth a wild beast, a fowl or fish, is not thereby proprietor, unless he had brought it within his power, as if he had killed it or wounded it to death, or otherwise given the effectual cause whereby it cannot use its native freedom ; as at the whale fishing at Greenland, he that woundeth a whale so that she cannot keep the sea for the smart of her wound, and so must needs come to land, is proprietor, and not he that lays first hand on her at land." It appears to result that a strong probability of complete capture is enough to give a right of possession against a party preventing the capture. If the net here had been completely closed, but there had been a fracture in it, a party could not have acquired a right to the fish by enticing it out of the net through the fracture, and then taking it. (They also argued on the statutes.)

Crowder, *contra*. The authorities from the Roman law and Bracton are in favour of the defendant, because *in this case there was neither
 *611] capture, occupation nor custody. The cases as to the whale fishery, including *Skinner v. Chapman*, Moo. & M. 59, note, turned on the custom. The passage cited from Bell lays down a doctrine which cannot be recognised in an English court, unless as it may prevail by custom in particular occupations, as the whale fishery. Blackstone, 2 Com. 392, refers, for the law, to the passage cited from Bracton. (The argument as to the statutes is omitted.)

Butt, on the same side, was not heard.

LORD DENMAN, C. J. It does appear almost certain that the plaintiff would have had possession of the fish but for the act of the defendant ; but it is quite certain that he had not possession. Whatever interpretation may be put upon such terms as "custody" and "possession," the question will be whether any custody or possession has been obtained here. I think it is impossible to say that it had, until the party had actual power over the fish. It may be that the defendant acted unjustifiably in preventing the plaintiff from obtaining such power : but that would only show a wrongful act, for which he might be liable in a proper form of action.

PATTESON, J. I do not see how we could support the affirmative of these issues upon the present evidence, unless we were prepared to hold that all but reducing into possession is the same as reducing into possession. Whether the plaintiff has any cause of action at all is not clear : possibly there may be a remedy under the statutes.

*WIGHTMAN, J. I am of the same opinion. If the property in
 *612] the fish was vested in the plaintiff by his partially inclosing them, but leaving an opening in the nets, he would be entitled to maintain trover for fish which escaped through that very opening.

(COLERIDGE, J., was absent.)

Rule absolute for reducing the damages to 20s., and entering the verdict for defendant on the second and third issues.

In Trinity term, (June 1st,) 1844, *M. Smith* obtained a rule to show cause

why a nonsuit should not be entered, or the action discontinued on payment of costs by the plaintiff. The ground of application was that the action had been brought to try rights under the fishery acts; and that the fish had been sold, (a) and the proceeds, amounting to 700*l.*, deposited with bankers to abide the result; but the decision on the second and third issues left the rights undetermined, and another action was necessary to ascertain them.

Crowder and *Butt* now showed cause. No ground is laid by affidavit for this application; (b) and two terms have elapsed since the making of the rule which it is proposed to disturb. The verdict on the several issues was general: and in *Price v. Parker*, 1 Salk. 178, "the court held, that after a general verdict there can be no leave given *to discontinue; for that would be having as many new trials as the plaintiff pleases: but that [*613 after a special verdict there may, because that is not complete and final; but in that case it is great favour." *Roe dem. Gray v. Gray*, 2 W. Bl. 815, and other authorities as to the granting leave to discontinue in case of a special verdict, are there cited in a note. (c) In *Goodenough v. Beetles*, 2 Cro. M. & R. 240, S. C. 5 Tyr. 793, a side-bar rule to discontinue after general verdict was set aside by the Court of Exchequer. *Sweeting v. Halse*, 9 B. & C. 365, 369, note (a), was there cited in favour of the discontinuance; but PARKE, B., said "there must have been something peculiar in the circumstances of that case; at all events, this objection was not made." And, in fact, there was not, in *Sweeting v. Halse*, any verdict subsisting, a rule having been made absolute for a new trial. A nonsuit cannot be entered after verdict: the plaintiff has then lost his opportunity.

M. Smith, contra. If the present rule is discharged, the result of this action will be that the defendant, though found guilty of a trespass, may claim the 700*l.* produced by sale of the fish. The object of this application is not, as in *Roe dem. Gray v. Gray*, 2 W. Bl. 815, to let in proof in contradiction of the former verdict, but to frame the complaint consistently with it, and with the real state of the facts. The court has power to allow a discontinuance in any stage of proceedings: and the case here is virtually the same as if the verdict were special. Entering a verdict for the defendant on particular issues, and allowing it to stand for the plaintiff *on others, under the direction of the court, is a proceeding introduced [*614 to accomplish the purpose of a special verdict without its technicalities. [COLERIDGE, J. The distinction between a special and a general verdict is that one is final, the other not.] This is a verdict over which the court has no control. [COLERIDGE, J. You apply after we have exercised our control.] The rule for altering the entry of the verdict was not delivered to the parties by the officer of this court till after Easter term. (d) The plaintiff is willing to take the rule now moved for, giving up the verdict for

(a) By agreement made at the time when the fish were taken out of the water.

(b) The motion was grounded on the judge's notes.

(c) 1 Salk. 178, note, (a) 6th ed.

(d) There was no affidavit on this subject. It is understood that the delay was occasioned by a disagreement between the parties as to the terms in which the rule was to be drawn up.

20s. and the costs. In *Goodenough v. Beetles*, 2 C. M. & R. 240, S. C. 5 Tyr. 793, the attempt to discontinue by a side-bar rule after verdict was irregular in itself.

Lord DENMAN, C. J. There are some peculiar circumstances in this case, but for which a rule to show cause would not have been granted. The application to enter a nonsuit seems to be given up. And it does not appear that leave to discontinue has ever been granted in a case like the present. A special verdict is distinguishable from a general one, as my brother COLERIDGE has pointed out; and here the verdict entered for the defendant is general. However, the proceedings being such as they are in this case, we might, perhaps, under some circumstances, have granted a rule to discontinue. But I think that the plaintiff is himself to blame for the situation in which he stands as to the money deposited. And, if he wished for an opportunity to try the real question of right, he should have stated his views on that subject in last Hilary *vacation when the *615] case was decided. The delay is not satisfactorily accounted for; and, if we granted this rule, we should encourage the making of similar applications at any distance of time. I regret the consequences; but we cannot go so far out of our way to protect parties against the result of their own acts.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Rule discharged.(a)

(a) The defendant demanded the 700*l.* of the bankers; but they, being warned by the plaintiff not to pay it, declined doing so; and the plaintiff commenced another action against the defendant, which is still depending. *Ex relatione Butt.*

NICKALLS v. WARREN. Nov. 21, 22.

Where an order of reference has a clause empowering the court, if the award be disputed, to remit the matters for the reconsideration of the arbitrator, and the case is so remitted, the arbitrator must hear fresh evidence, if tendered, as on the original reference.

Quære whether, under such a clause, the court may remit the case for reconsideration a second time.

But, where the case had been once so remitted, and the arbitrator had declined to hear more evidence, but amended his award, deciding in favour of the same party as before, and, on motion to set aside such further award, the other party opposed a further reference to the same arbitrator, the court set the award aside.

This was an action, brought by the owner and occupier of a mill, situate on a stream of water at Ardleigh in Essex, against the occupier of another mill lower down on the same stream, for improperly penning back the water. The cause came on for trial at the Essex Summer assizes, 1843, when a verdict was taken for the plaintiff with 500*l.* damages, subject to the award of a barrister, to whom the cause and all matters in difference between the parties were referred. The order of reference empowered the arbitrator to determine, as between the plaintiff and defendant, to what head of water

the occupier of defendant's mill was entitled, to "ascertain and determine the rights of the parties as to the use of the stream, and, if [*616 necessary, to direct the mode in which such rights should be exercised: and it provided that, if the validity of the award should be disputed, or a motion made to set the same or any part thereof aside, the Court of Queen's Bench should have power "to remit the matters hereby referred to the reconsideration and determination of the said arbitrator."

The parties attended the arbitrator, and gave evidence on the points referred, and, among others, as to the head or depth of water which the defendant was entitled to have at the penstock of his mill, the defendant claiming a depth of fifteen inches, and the plaintiff that it should be reduced several inches lower. The arbitrator made his award: and, in last Hilary term, (January 15th,) the plaintiff obtained a rule to show cause why it should not be set aside, on the ground, among others, that the arbitrator had not determined, as between plaintiff and defendant, to what head of water defendant, as occupier of his mill, was entitled, nor whether, or to what extent, if any, he was entitled to pen back the water on plaintiff's premises, nor to what height or head of water he was entitled to keep the water in his penstock. Cause was shown in the same term, (January 30th;) and the court then ordered that the matters referred by the order of nisi prius should "be remitted back to the said arbitrator for his reconsideration and redetermination." The arbitrator gave an appointment, and proceed in the reference; and the plaintiff's counsel tendered several witnesses whose evidence (as was stated on affidavit in support of the after mentioned rule) was not known to plaintiff or his attorney before the making of the award, but would, as counsel stated on the reference, have been of the [*617 *highest importance, and would have shown "that the penstock at the mill of the defendant had been so raised from time to time as to disentitle him to maintain the head of water in his present penstock to the height" after mentioned: but the arbitrator refused to hear such witnesses, or to receive any further evidence on the matters in difference; and he afterwards made his further award, (written at the foot of the original one,) as follows.

"The matters referred to me by the above recited order of assize bearing date," &c., "having, by a rule of the Court of Queen's Bench, bearing date," &c., "been remitted back to me for my reconsideration and determination, I further award and determine that the defendant, and the occupiers of the mill of the defendant in the pleadings of the said cause mentioned, are entitled to retain the penstock now attached to the said mill, and to have and maintain therein a head of water of the depth of fifteen inches and no more."

In last Trinity term, (June 11th,) a rule was obtained calling on the defendant to show cause why the award should not be side, on the grounds: 1. That the arbitrator had refused to receive the evidence of witnesses mentioned in the affidavit on which this rule was moved for. 2. That he had not determined the head of water to which defendant was entitled, if

any. 3. That he had not determined the questions and matters mentioned in the rule made in this cause on January 15th in last Hilary term. 4. That he should have made a new and entire award, and that it was not sufficient to make a supplemental and further award.

Platt, M. Chambers and *Lush* now (a) showed cause. The arbitrator *618] was directed by the rule of January 30th *to reconsider and re-determine. That did not authorize him to reopen the award. [WIGHTMAN, J. The assumption was, that he had not yet decided on the matters then sent before him.] Even if he had a right to hear more witnesses, the parties could not insist upon his doing so: he might exercise a discretion. The evidence offered was only additional on points which had been exhausted already. The arbitrator went too far even in hearing further observations. The clause, commonly adopted of late, for referring matters back to the arbitrator, will produce much mischief if its effect be that causes, already heard at great length, must be entirely reheard. There was no necessity to make a new award; it was sufficient to endorse upon or annex a paper to the original one.

Kelly, *contra*. The argument on the other side, if available at all, would prove that the court was wrong in sending the case back. The award was clearly not final as to the depth of water. What, then, was the meaning of the order referring the case to him again? Was he bound only to look over his notes, and make an addition to his award? His duty was the same as under the original order of reference; only he was relieved from the necessity of going through the evidence again if no party wished that a witness should be called back. But, the object of the reference not having been previously accomplished, the arbitrator was bound to hear evidence as long as the parties tendered it, till the subject was exhausted. [Lord DENMAN, C. J. You state that more largely than any of the court has stated it. The arbitrator must exercise some discretion as to the quantity of evidence he shall hear. The clause as to referring back, in this case, is not very happily *619] *worded. It would have been desirable that the words "or any of them" should have been inserted after "matters hereby referred;" then the court could have shaped an issue for the arbitrator on the point which was left uncertain. As the order stands, all is referred back: the arbitrator is in a position which requires him to hear the whole cause again; and, if so, he could not refuse to hear further evidence.]

Platt then suggested that, if the court were of his opinion, the matters should again be remitted to the arbitrator.

Kelly, *contra*. The court cannot remit them back a second time: their power is exhausted. And, if there be such a power, it would be desirable that the case should go to a different arbitrator, and not to one who has made up his mind on the facts. (*Platt* declined this.)

Lord DENMAN, C. J. There certainly is some doubt whether this clause gives us the power of sending a case back toties quoties. But we need not

(a) The argument was begun on November 21st, and adjourned to the 22d.

raise that question now. It does not seem satisfactory, under the circumstances, that the case should go again to the same arbitrator; and we think the rule should be made absolute.

COLERIDGE, J. It is desirable that this clause should be modified in future, and should enable the court to remit the matters referred "or any part of them" for reconsideration.

WILLIAMS and WIGHTMAN, Js., concurred.

Rule absolute.

*The QUEEN v. WILSON and Others. Nov. 21. [1862]

An order of quarter sessions, brought up by certiorari, appeared to be an order quashing an indictment containing counts for forcible entries, assaults, and a riot. On motion to quash the order: *Held*,

1. That the sessions, having jurisdiction over the subject matter of the indictment, had jurisdiction to quash it; and, as to this, it made no difference that the defendants had been held to bail more than twenty days before the sessions, and had given the prosecutor notice of their intention to appear there; stat. 60 G. 3, & 1 G. 4, c. 4, s. 5, not taking away the common law power of a criminal court to deal with an indictment properly before them.
2. That this court therefore would not inquire, on this proceeding, whether the indictment was properly quashed; but that the proper way of raising such a question was on writ of error.
3. That this court would not, on such proceeding, allow a discussion as to the motives upon which the quarter sessions acted.

Rule nisi for quashing the order of sessions discharged.

NEWTON had obtained a rule for quashing an order of the Gloucestershire Quarter Sessions, brought up to this court by certiorari.(a) The order, as returned to the certiorari, was as follows.

(a) The rule nisi for a certiorari was obtained by Newton, in Hilary term, 1844. The affidavits stated the preferring of the indictment, and the minute of the clerk of the peace, made thereon, of the order for quashing it; and copies of the indictment and minute were annexed. The affidavits further stated as follows. A true bill was found at the Michaelmas sessions, 1843; and, on 30th October, in that year, Mr. Newton, the prosecutor, received notice from the attorney for the defendants that he would not advise a removal by certiorari, and that the defendants would be satisfied to abide by the judgment of the sessions. In November following, all the defendants entered into recognisances to appear and plead at the next sessions, except one defendant who was committed for want of bail, and another who was not arrested. All the defendants gave the prosecutor notice of trial at the next sessions. At those sessions, (Epiphany, 1844,) a traverse was entered for all the defendants, by their attorney; and all except two appeared at the bar, and were charged. Mr. Newton, who was a barrister, appeared as prosecutor; when the counsel for the defendants then present objected that he could not address the jury, nor be heard except on oath. The hearing was adjourned until the next day; when the counsel for the defendants moved to quash the indictment, on the ground that in both the first and second counts more than one offence was charged, whereby the defendants were prejudiced in their defence: he admitted, however, that the third count was good. The court refused to hear the prosecutor in answer to the objection, and quashed the indictment.

In last Easter term, (May 2, 1844,)

Greaves, for the defendants, showed cause, and H. S. Keating appeared for the justices, to receive the directions of the court; and Newton was heard in support of the rule.

Besides the authorities mentioned in the text, the following were referred to: 4 Hawk. Pl. Cr. 148, 7th ed. Book 2, ch. 27, s. 31; *Rice v. Regem*, Cro. Jac. 404; *Long's Case*, Cro. Eliz. 489; *Rez v. Pennegoes and Machynlleth*, 1 B. & C. 142; Dickinson's Quarter Sessions, 917, 5th ed.; 1 Chitt. Cr. L. 299, 2d ed.; 4 Hawk. Pl. Cr. 83, 7th ed. Book 2, ch. 25, s. 146; Com. Dig. Indictment, (H); *Withpole's Case*, Cro. Car. 147; *Rez v. Ward*, note (p) to 1 Stark. Cr. Pl. 301, 2d ed.; *Regina v. Rigby*, 8 C. & P. 770; *Regina v. Norton*, 8 C. & P. 196; *Rez v. Rookwood*, Holt, 683, 684, S. C. 13 How. St. Tr. 139; *Rez v. Wheatly*, 2 Bur. 1125, 1127; *Rez v. Weston*, 1 Str. 623; *Regina v. Bethell*, 6 Mod. 17; *Rez v. Kingston*,

*621] "Gloucestershire, to wit. Be it remembered that, at the general quarter sessions, &c., holden at, &c., in and for the county of Gloucester, &c., in the first week after the 11th day of October, &c., in the seventh year, &c., before Ebenezer Ludlow, serjeant at law, &c., justices, &c., upon the oath of William Hill, &c., good and lawful men, &c.; it is presented in manner and form following; that is to say:

County of Gloucester, to wit. The jurors, &c., present that George Wilson, of, &c., William Holtham, &c., (nine persons more named,) all late of, &c., together with divers other evil disposed persons, &c., on, &c., (the count then charged a forcible breaking and entering into a dwelling-house,

*622] *alleged to be in the lawful possession of Augustus Newton, Esq., and a yard, &c., being in the curtilage of the said dwelling-house, and an assault upon William Philip Newton, Francis Robert Newton, and the said A. Newton, and an unlawful imprisonment of the said A. Newton;) against the form of the statutes, &c., and against the peace, &c.

And the jurors, &c. That the said G. Wilson, and the said W. Holtham, together with divers other evil disposed, &c., on, &c., (the count then charged a forcible entry into a dwelling-house described as before, and an assault upon, and an unlawful imprisonment of, the said A. Newton;) against the peace, &c.

And the jurors, &c. That the said G. Wilson, W. Holtham, &c., (naming the eleven parties charged in the first count,) together with divers other, &c., on, &c., (the count then charged an unlawful and riotous assembling, and an unlawful and riotous assault upon the said W. P. Newton, F. R. Newton, and A. Newton,) to the great disturbance, &c., in contempt, &c., and against the peace, &c.

Whereupon the sheriff of the said county of Gloucester is commanded not to omit for any liberty in his bailiwick, but that he cause the said G. Wilson, &c., (the ten others named in the first count,) to come and answer to the premises. And thereupon, at the general quarter sessions of the peace, &c., holden at, &c., in Gloucester, for the said county of Gloucester, in the first week after the 28th day of December, &c., in the seventh year, &c., before Ebenezer Ludlow, serjeant at law, &c., justices, &c., come as well William Joyner Ellis, Esq., clerk of the peace of the said county,

*623] who prosecutes for our said lady the queen in this behalf, *as the said George Wilson, &c., (omitting one of the other ten, and also giving a different name to another of the ten, stating him to have been indicted by the original name,) in their proper persons; whereupon, all and singular the premises being seen and fully understood by the court here, and mature deliberation had thereupon, it is considered and adjudged, by the

8 East, 41; *Regina v. The Justices of Hampshire*, 9 Dowl. P. C. 171; *Regina v. Taylor*, 9 Dowl. P. C. 600.

Per Curiam, (Lord Denman, C. J., Patteson, Williams, and Wightman, J.) This rule must be made absolute. It is necessary to see what the judgment is. If a regular judgment be returned, then the prosecutor will have a right to his writ of error, and is entitled to see what the judgment is.

Rule absolute.

same court, that the same indictment be, and the same is, quashed, and that the said defendants depart hence without day in this behalf.

By the court.

H. S. Keating (on behalf of the magistrates) now showed cause. If the quarter sessions had jurisdiction, the order which it is sought to quash is a judgment of that court on an indictment: such a judgment cannot be quashed on certiorari; *Rez v. Seton*, 7 T. R. 373. Even if, before judgment and after verdict of guilty, the indictment be removed by certiorari for the purpose of arresting the judgment, the court will send the record back by procedendo, and will not examine the indictment; *Rez v. Jackson*, 6 T. R. 145. The judgment can be inquired into only by writ of error. It seems that, at one time, it was usual to remove the record into the crown office and then bring a writ of error coram nobis; 1 Chitt. Cr. L. 749, (2d ed. :) but that course has become obsolete, and, besides, would not warrant the course pursued by the present defendant. The only ground, therefore, upon which this rule can be made absolute must be that the court of quarter sessions had no jurisdiction to quash the indictment. This, however, is in practice frequently done at the assizes; and can be so done only by the common law power incident to a court of oyer and terminer. It is indeed said, in Archbold's Summary of the Law relating to Pleading and Evidence in Criminal Cases: (a) "The application to quash an indictment is made to the court where the bill is found; except in cases of indictments at sessions or in other inferior courts, in which cases the application is made to the Court of Queen's Bench, the record being previously removed there by certiorari:" but for this there appears to be no authority. There can be no distinction, in this respect, between a court of quarter sessions and any court of oyer and terminer. It is laid down in *Hartley v. Hooker*, 2 Cowp. 523, 524, that, wherever an inferior court has cognisance of an offence, it has all the common law incidents of a criminal court, unless a particular method of proceeding be prescribed in the case of the particular offence. *Rez v. Wadley*, 4 M. & S. 508, shows that this rule is applicable to the quarter sessions. The commission of justices, by the second assignavimus, authorizes them to inquire at sessions "of all and all manner of felonies," "trespasses," &c. (b) The ordinary commission of oyer and terminer, (c) gives no higher power in felonies or misdemeanors. In strictness, the sessions might formerly (d) have tried cases of murder: they abstained from doing so only by an enlarged construction of the clause in their commission directing them, in a case of difficulty, not to give judgment except in the presence of a judge of the K. B. or C. P., or of assize. Stat. 34 Ed. 3, c. 1, gives power to the justices of peace "doier et terminer a la suite le roi tote manere de felonies et trespas faites en meisme le countee selonc les leys et custumes avantdites," that is

(a) Page 65, 9th ed. See now 10th ed. p. 65.

(b) See 3 Burn's Justice, 988, (ed. 29;) tit. *Justices of the Peace*, § II.

(c) See 3 Hawk. Pl. Cr. 31, (ed. 7,) Book 2, ch. 5, s. 22.

(d) See now stat. 5 & 6 Vict. c. 38.

“selonc la ley et custumes du roialme.” The jurisdiction of the court being so large, the party seeking to restrict it must show some authority for confining their powers. [*Newton*, in support of the rule, intimated that he should object that the sessions had no jurisdiction to quash the indictment before plea pleaded. COLERIDGE, J. The practice is the other way; in *Rex v. Frith*, 1 Leach, Cr. C. 10, the court objected to quashing an indictment after plea pleaded.] Then, further, the sessions did rightly in quashing the indictment. [Lord DENMAN, C. J. That point we need not discuss.]

Newton, contra. The passage cited from Archbold shows the common understanding to be that the sessions cannot quash an indictment in any case. Here, further, it appears that the defendants had been held to bail more than twenty days before the sessions; and therefore, under stat. 60 G. 3, & 1 G. 4, c. 4, s. 5, the trial ought to have proceeded at those sessions; the more so, as the defendants gave notice to the prosecutor of their intention to appear. But, supposing the sessions to have had the power to quash upon proper grounds, here no such grounds existed; the indictment was quashed, on an objection which ought not to have prevailed, apparently from some prejudices conceived; and the jurisdiction therefore failed.

Where *the sessions have no jurisdiction, a certiorari lies, and that *626] even though they profess to proceed under a statute which directs that no certiorari shall issue; *Rex v. The Justices of the West Riding of Yorkshire*, 5 T. R. 629. It is indeed laid down that an indictment should properly be quashed before the plea is pleaded; by which a plea of Not guilty is meant. But, in the case of such an objection to the indictment as was here insisted on, the proper course was to put the defendants to plead in abatement or demur: the sessions might then have dealt with the objection formally. By the present course, the defendants deny the legality of the indictment without admitting the facts. Here no trial has been had, either by the court or the country. Till some issue in law or fact was joined, the case was not coram judice. The ordinary instances of quashing indictments afford no analogy here, because the quashing takes place in general at the suggestion of the prosecutor: but, where the crown insists on the legality of the indictment, the defendants ought to be put to demur. The defendant may move to quash where it appears that no judgment can be given; Archbold's Summary, &c., 64, 10th ed.: in other cases he is bound to plead or demur. It is argued that the proper course for the prosecutor would be to bring a writ of error: but, where the objection is to the jurisdiction, it is clear that he is entitled to a certiorari.

Lord DENMAN, C. J. We have heard an argument of some length; but the question rests on two grounds only. The first is the point of jurisdiction. I have no *doubt that the sessions do possess the power *627] of quashing an indictment before plea pleaded. The superior courts have frequently adopted this course; and I see no reason for doubting that the sessions have the same power. Acting on our own knowledge of the practice, we can feel no difficulty in saying that they had power to do

what they have done. Then, to say that the indictment is good and yet has been quashed, is nothing to the purpose. For, even if we saw that a good indictment had been overruled on demurrer, we should interfere only on writ of error. The certiorari brings the record hither: but then we look at it only with the object of seeing whether jurisdiction existed. The argument here really comes only to an attempt to show that the sessions have acted with an improper motive. The proper proceeding would be, in that case, to move for a criminal information. We could not allow the counsel for the justices to defend the propriety of their conduct, that question not being properly before us in this proceeding: and we do not now anticipate what view we might take of it. The argument goes to the question of conduct only: and the rule must therefore be discharged.

WILLIAMS, J. There is great weight in Mr. *Keating's* remark, that it lies on the party impeaching the jurisdiction to show some authority for denying the competency of the sessions to quash an indictment: the more so, as we have been properly reminded of the large jurisdiction which that court possesses. There appears to exist no distinction as to the common law felonies which it was entitled to try: and, if it is intrusted with such power, the cases cited show that it may proceed according *to the ordinary common law course; if so, it has power to quash unless [*628 some authority can be cited showing that it is excluded from such jurisdiction. No such authority has been produced, except a passage in a work of great ability, no doubt; but, had there been any authority for that passage, we should no doubt have found it there. On this return, therefore, which shows that the indictment has been quashed, the only question is as to the competency of the court; and, from the nature of the court, we must assume that it had authority to quash.

COLERIDGE, J. I am of the same opinion. This can be properly argued only as a question of jurisdiction. So it was put by Mr. *Keating*; and indeed, in terms, it was so put by Mr. *Newton*. There can be no doubt that the constitution invests the quarter sessions with criminal jurisdiction, and that they sit with all the incidents of a criminal court. But Mr. *Newton* contends that, although this be so, the rule ought to be made absolute on two grounds. The first is that the defendants had been held to bail more than twenty days before the sessions, and had given notice of their intention to appear; and that, therefore, it was compulsory upon the sessions to try the case. That is a misunderstanding of stat. 60 G. 3, & 1 G. 4, c 4, s. 5. The statute was passed to put an end to the practice which had formerly prevailed of postponing the trial by traverses. But the courts still retain the power of dealing with the indictment as at common law, and may therefore postpone trials. I do not know whether any stress was laid on the fact that the indictment was found at the session preceding that at which it was quashed: but *there would be nothing in this: the same thing might happen at the assizes. The court has the indict- [*629 ment before it; and quashing an indictment is one way of disposing of it;

any objection to this mode would apply to any other; as, for instance, to judgment for the defendants on demurrer. Mr. *Newton's* other objection, though admitting the jurisdiction in terms, in fact impeaches it. He says that the sessions have done wrong because no court can quash an indictment except under certain circumstances. That is, that if the sessions arrive at a wrong conclusion it comes to the same thing as if they had no power to arrive at any conclusion at all. But the jurisdiction is vested before the court arrive at any conclusion.(a) If a court has power to decide, and decides wrong, that is not an excess of jurisdiction. Mr. *Newton* argues that an indictment can be quashed only where it appears that no judgment can be given upon it. I think that is not so. In fact indictments are often quashed where they contain a fatal defect, in order that another indictment may be framed. In *Rex v. Roysted*, 1 Kenyon, 255, an indictment was quashed because it contained a defect which would have been fatal on demurrer. Here, then, the question is simply one of jurisdiction: and, as I am satisfied that the court had the power to quash, I will not for one moment examine whether it exercised its power rightly. If a writ of error be brought, we shall then inquire whether what the sessions did was erroneous in law or not.

WIGHTMAN, J. I am of the same opinion. This is a rule for quashing an order of sessions which quashed *an indictment. As a general
 *630] principle, we can examine the judgment of a court of record only on error; *Rex v. Seton*, 7 T. R. 373; *Rex v. The Justices of the West Riding of Yorkshire*, 7 T. R. 467. But here it is contended that what the sessions have done is entirely beyond their jurisdiction. Now the subject matter of the indictment clearly is within their jurisdiction: and the validity of it would come before them on demurrer: they might decide the question wrongly; but they have jurisdiction to decide it. In quashing the indictment they have only done without demurrer what they certainly might do on demurrer. Mr. *Newton's* argument goes merely to show that the power has been wrongly exercised: but that we cannot inquire into upon a rule for quashing the order on certiorari. If there has been any malpractice, that must form the ground of proceedings of another kind.

Keating then applied for costs, the application being against magistrates.

LORD DENMAN, C. J. I think there should be no costs. We had entertained considerable doubt on the question, and wished to hear it discussed.

Rule discharged, without costs.

(a) See *Regina v. Bolton*, 1 Q. B. 66.

•DOE on the demise of JOHN LE KEUX v. HARRISON [*631
and Others. Nov. 22.

The heir of copyhold lands not appearing on proclamation, the lord seized quousque. Afterwards the heir claimed; and, the lord declining to admit him, on the supposition that another party had title, the heir obtained a rule nisi for a mandamus to admit. On discussion of the rule, it was ordered, by consent of the heir and lord, (no other party appearing,) that an ejectment should be brought to try the right, the heir being lessor of the plaintiff, and the lord defendant; and that the rule for a mandamus should be enlarged in the mean time: and the parties agreed to waive technical objections on the trial.

The heir proved title; and the defendant put in a will of the ancestor, devising the lands to the London Annuity Society. No further evidence being given for the defendant, the judge left the case to the jury on the proof of title in the lessor of the plaintiff; and the plaintiff had a verdict.

On motion to enter a nonsuit, cause being shown at the same time against the rule nisi for a mandamus:

Held, that plaintiff was entitled to recover, for that the lord, though he had seized quousque, could not hold against the heir on the mere proof of a devise to parties who had not claimed admittance, and of whom nothing was known. Rule for a nonsuit discharged. Rule for a mandamus made absolute.

EJECTMENT for lands in Surrey. The action was brought under the following circumstances.

Richard Le Keux died in 1840, seised of the lands in question, which were copyhold of the manor of Old Paris Garden in Surrey, and to which he had been duly admitted. By his will, dated August 4th, 1837, he devised as follows. "I give for ever the whole of my landed property to the London Annuity Society, situate at Blackfriars' bridge, of which I was formerly a member: the inclosed paper is an information of every thing concerning the estate; the other paper is an account of my funded property as it now stands. Be it further known the London Annuity Society do pay out of the proceeds of the said estate to Ann Cox, according to my late sister's will, the sum of 10*l.* a year for the care and support of sundry dumb animals living with her at the time of her death." The society did not claim admittance, and were not admitted. Proclamations were made for the heir of Richard Le Keux: and, no one appearing on the third proclamation, the defendants, the lords of the manor, seized quousque. Afterwards, the lessor of the plaintiff demanded admittance as heir at [*632 law; and, the lords not granting it, he obtained a rule nisi for a mandamus commanding them to admit. The lords, on June 12th, 1844, showed cause against the rule. No one appeared for the Annuity Society. The court, by consent of the parties appearing, ordered that an action of ejectment should be brought, the party claiming as heir to be lessor of the plaintiff, and the lords defendants; and that the rule for a mandamus should be enlarged until after the trial: and it was agreed between the parties that, in trying the cause, no technical objections should be taken.

On the trial, before PARKE, B., at the Guildford Summer assizes, 1844, evidence was given to show that the lessor of the plaintiff was the heir at law of Richard Le Keux. The defendants' counsel, in answer, put in the will

of Richard, (the execution of which was admitted,) but offered no further evidence. It was objected, on behalf of the plaintiff, that the will, without proof of any devisee having been admitted, could have no effect; and PARKE, B., was of this opinion. For the defendants it was urged that the agreement to waive technical objections excluded this: but the learned judge held that he could not avoid noticing it. He reserved leave to move to enter a nonsuit, and left to the jury, as the only question for them, whether the lessor of the plaintiff had made out his pedigree. Verdict for plaintiff.

Gurney, in this term, obtained a rule to show cause why a nonsuit should not be entered; and the court said that, when cause was shown, they would also hear the further discussion of the rule nisi for a mandamus.

*Platt and Peacock now showed cause against the rule nisi for
*633] entering a nonsuit, and supported the rule nisi for a mandamus. On the death of a copyholder, his heir is legally entitled to a mandamus to enforce admittance; *Rez v. The Brewers' Company*, 3 B. & C. 172; (a) *Rez v. The Lord of the Manor of Bonsall*, 3 B. & C. 173: and it was so held in *Rez v. Wilson*, 10 B. & C. 80, where the copyholder had devised the land, but the devisees disclaimed. Lord TENTERDEN said there: "By the common law a copyhold estate in fee, after surrender, remains in the surrenderor and his heirs until the surrenderee comes in and is admitted. Here the devisees were the surrenderees, and on the death of the testator the estate descended to his heir, subject to the right of the devisees to be admitted. When they declared that they would not come in, the obstruction that stood in the way of the present right of the heir was removed." The authorities are collected in 1 Scriv. Cop. 357, 626, 627, (3d ed.) That the devisees have never claimed admittance is not a mere technical objection. The heir at law, even without admittance, may maintain ejectment against a stranger; a devisee, not admitted, has no legal title, and could not, therefore, resist such an ejectment. The defence here is, substantially, that of the lord; and the question is, whether he can keep the heir out till a devisee claims. The admission of the heir, in this case, can be no injury to the lord; if the devisees should present themselves hereafter, he is not prejudiced. *Doe dem. Burrell v. Bellamy*, 2 M. & S. 87, shows that, if the heir is entitled to ad-

mittance, but the lord has withheld it and *seized the land, a de-
*634] fendant in ejectment brought by the heir cannot avail himself of the state of things created by the lord's own wrongful act. Further, it was not proved at the trial that the London Annuity Society was a body competent to take by devise, or even existing when the action was brought. (b)

Sir F. Thesiger, solicitor-general, and Gurney, contra. The question must mainly turn upon the agreement on which the parties went to trial. The non-admittance of the devisees, as well as that of the heir, was a tech-

(a) And see *Rez v. The Lord of the Manor of Hexham*, 5 A. & E. 559.

(b) With regard to this, and some other parts of the case, the affidavits used on the motion for a mandamus were referred to: but it is not thought necessary to notice them more particularly.

nical point which, by the previous understanding, could not be raised. The defendants do not dispute that a party proved to be entitled as heir may demand admittance: but the lord is entitled to ascertain who really is the proper tenant, and may dispute the heir's claim if there be ground for so doing; as if it appear that there is a devisee who ought to be admitted, though he may not have claimed admittance. Whatever might be the case if the lord had not seized, yet, after having done so, he is not so entirely an uninterested party that he can reasonably be required to allow the heir's title as against himself upon mere demand. *Doe dem. Burrell v. Bellamy*, 2 M. & S. 87, is no authority as to the general law: there the lord had seized and demised the lands, no heir appearing on proclamation: after the lapse of years the heir claimed admittance: the steward declined giving it in the lord's absence; and, the heir, under these circumstances, having obtained a verdict in ejectment against the lord and his tenant, the court merely refused *a rule to show cause why that verdict should not be set aside. The ground of motion was that the heir should have tendered himself for [635 admittance at the lord's court; and the only observation reported, on the refusal of the rule, is, that what had been said by the steward was a dispensation with such attendance. According to the argument for the lessor of the plaintiff in this case, he cannot be entitled to a mandamus; for he may enforce all his rights by the common course of law. [COLERIDGE, J. *Rex v. The Brewers' Company*, 3 B. & C. 172, answers that observation.] The issue in the present action was substituted for an issue on a traverse of the return to a mandamus; every point of which the defendants could have taken advantage on such traverse should be available to them now. As to the existence of the society, the affidavits on the motion for a mandamus sufficiently proved it; and the court will not presume that they were a body incompetent to take, or that the devise was void within the statute of mortmain, 9 G. 2, c. 36. [COLERIDGE, J. They might exist: but it ought to have been shown whether they were a corporation, or a body formed under a trust deed, or in what other manner they might be able to take land; especially as the will was made so long ago as 1837, and no claimant under it has appeared.] Suppose the words of devise had been "to John Smith, who formerly lived in my service, and his heirs:" it might reasonably have been presumed that such a person existed, and might prefer a claim. And here the description is more precise: "the London Annuity Society, situate at Blackfriars' Bridge." [WIGHTMAN, J. It does not appear that they *were persons who could take land. COLERIDGE, J. You do not [636 go far enough in proof. This was matter of substance.] The objection, at the trial, was not raised in this form, but turned wholly on the want of admittance. The difficulty now suggested could have been removed by evidence. [Lord DENMAN, C. J. It would not have been sufficient, unless you could have shown a claim made. The lord is not to seize and hold the land against the heir, without showing that some person has claimed adversely. This was taken for granted in *Doe dem. Burrell v. Bellamy*,

2 M. & S. 87. It is clear, on principle, that, if proclamation is made, and the land seized till the heir comes in, and the heir afterwards does come, the lord cannot answer his claim by saying that parties who have not appeared are entitled.] At all events, the heir cannot succeed both in an action and on mandamus. [Lord DENMAN, C. J. Perhaps a feigned issue would have been a more proper mode of trying the cause than an ejectment; but this course was better for you, because it enabled you to set up any claim adverse to that of the lessor of the plaintiff, though you have not done so. WIGHTMAN, J. No one else claiming, the lessor of the plaintiff is entitled to admittance.] The defendants may be compelled to pay mesne profits twice, if the devisees should come in hereafter.

Lord DENMAN, C. J. There is no doubt in this case. The plaintiff proved his title; and nothing was stated in evidence against it: he was therefore entitled to succeed in the action. And he is entitled to a mandamus, because he is the heir, and there is no adverse title to prevent his admittance.

*WILLIAMS, J., concurred.

*637] COLERIDGE, J. The seizure quousque makes no difference in the right of the heir. The lord seizes only till the tenant comes in: that seizure does not give him any adverse title.

WIGHTMAN, J., concurred.

Rule nisi for entering a nonsuit discharged.
Rule absolute for a mandamus.

Sir R. DOBSON and JOHN SUTTON v. GROVES and Others.
The QUEEN v. Sir RICHARD DOBSON, JOHN SUTTON, and Two Others. Nov. 23.

Where an arbitrator questions a witness and receives statements from him in the absence, and without the consent, of one party to the reference, the court will set the award aside, without taking into consideration the nature of the statements or the probability of their having influenced the decision.

G. indicted D. for a nuisance committed by erecting a fixed pier in the bed of the Thames. D. brought an action against G. for disturbing his right of waterway near the same place, by placing barges, &c., which formed a floating pier. Both cases were referred to an arbitrator. After hearing and dismissing the parties, the arbitrator sent for a deputy water bailiff, who had been examined on the reference, and questioned him as to the means of giving convenient access to the shore, supposing the fixed pier to be removed. Neither party to the reference appeared at or had notice of the meeting; a special pleader, who had been employed on the reference as advocate, was present, but not professionally. The party who afterwards complained of this proceeding had notice of it four days before the arbitrator made his award, but did not remonstrate.

By his award on the indictment, the arbitrator directed a verdict of Guilty to be entered, and the fixed pier removed; by his award in the action he ordered a verdict to be entered for the defendants on the issue upon Not guilty, and on certain other issues, and for the plaintiffs on the residue, and directed that, when the fixed pier should have been removed as ordered by the other award, the defendants should place their barges according to certain specified regulations.

Held that, by reason of the irregularity, no part of the award in either case could stand. And, on motion to set the awards aside, that the omission to remonstrate after knowledge of the irregularity, and before making of the awards, was no answer.

IN *Dobson v. Groves*, the plaintiffs sued for an injury done to their rever-
sionary right by placing barges, timbers, &c., on the river Thames, near
to a messuage and premises occupied by one Chappell as tenant to
*the plaintiffs,(a) and thereby obstructing the access and navigation
to the said premises. The defendants pleaded Not guilty, and [*638
other pleas; on which issues were joined.

In *Regina v. Dobson*, the defendants were indicted for a nuisance com-
mitted by making and continuing an embankment in the river Thames, at
the parish of St. Alphage, Greenwich, whereby the navigation was ob-
structed. Plea, Not guilty.(b)

The cause of *Dobson v. Groves*, coming on for trial at the Maidstone
Spring assizes, 1844, was referred, as was also the indictment, to a bar-
rister, verdicts being taken for the plaintiffs and the crown, subject to the
awards respectively. Power was given to the arbitrator in both cases to
order removal of obstructions; and, in the action, to regulate the waterway
to, from and in front of the premises of plaintiffs and their tenants. The
arbitrator, in last Trinity vacation, made and published his awards.

Badeley, in this term, obtained rules to show cause why the awards
should not be set aside on the ground of irregularity on the part of the
arbitrator in holding meetings with the defendants in the action, (prosecutors
of the indictment,) their counsel and attorney, and one of their witnesses,
in the absence of the opposite parties or their attorney.(c) The material
facts stated on *affidavit in support of the applications respectively [*639
were as follows.

The arbitrator held several meetings on the references respectively,
attended by counsel and attorneys on each side, and by a special pleader
under the bar on behalf of the prosecutors of the indictment and defendants
in the action. At a meeting held, September 30th, on the matters of the
indictment, the attorneys and special pleader being present, but no counsel,
the arbitrator inquired of the defendants' attorney if he meant to call
Mr. Peirce, the under water-bailiff of the city of London. The attorney
replied that he did not; and the arbitrator then put the same question to
the attorney for the prosecution, who likewise declined calling him, assign-
ing, as a reason, that the evidence Mr. Peirce would be called upon to
give might prejudice him with his employers. The arbitrator then said
that he should himself examine Mr. Peirce, and appointed a meeting for
the purpose on the following day at Greenwich. At that meeting, (October
1st,) the arbitrator examined Mr. Peirce, but refused to allow the defend-

(a) There were several counts, naming other tenants, and one laying the interrupted right
in the plaintiffs themselves.

(b) The proceedings arose out of disputes between two rival packet companies, one of which
landed and embarked passengers at a fixed pier (the embankment mentioned in the indictment)
at Greenwich, and the other used, for the same purpose, a floating pier, the obstruction com-
plained of in the action.

(c) The rule in the action was obtained on some additional grounds, which it is unnecessary
to state.

ants' attorney (counsel being still absent) to cross-examine. The case in respect of the indictment was then brought to a close; and the arbitrator said that he wanted nothing further from either party; that he intended leaving town in a week, and that he should first make his awards. The attorney for the defendants on the indictment and for the plaintiffs in the action deposed that he never received any further notice or appointment from the arbitrator of any meeting in regard to either of the references, nor did he know of any meeting that was to take place; that he neither attended, nor authorized any person to attend, any subsequent meeting; and that any

*640] such meeting at *which either counsel, special pleader or attorney for the prosecutors of the indictment or defendants in the action was present took place without his knowledge. On the 3d of October, Mr. Sutton, one of the plaintiffs in the action and defendants to the indictment, who had attended the meeting of October 1st, went, on business unconnected with the arbitration, to the Ship tavern at Greenwich, where the meeting of October 1st had been held. He was there told that the arbitrator and other parties were in the house; and, going into the room in which the former meeting had taken place, he found there the arbitrator, the special pleader who had attended for the prosecution, and the witness Peirce, perusing papers and plans connected with the matters of the arbitration. Sutton observed to the arbitrator that he had not been aware there was to be a meeting on that day, and did not think that his attorney knew it. The arbitrator replied that he did not expect to see the defendants' attorney. Sutton then said that he supposed there would be no objection to his remaining, as the special pleader for the execution was present. The arbitrator said that he had the special pleader there to give him some information, by which, however, his opinion would not be biassed; and he refused to allow Sutton to remain. Sutton withdrew, leaving the other three parties together, and forthwith called at the office of his attorney, and reduced into writing what had passed. He was afterwards informed that the

*641] meeting at the Ship tavern lasted nearly two hours. (a) On the *7th of October the arbitrator made his awards, directing, as to the indictment, that a verdict of Guilty should be entered against three of the defendants, and of Not guilty as to one, and that the embankment should be removed with all reasonable speed. The award as to the action directed that a verdict should be entered for the defendants on some of the issues, (including that on the plea of Not guilty,) and for the plaintiffs on the rest; that, as soon as the embankment should have been removed as directed by the other award, the defendants in the action should, to a certain extent, (which was described,) remove their barges, &c., and that the future placing and use of barges, &c., by them near the premises mentioned in the declaration should be subject to regulations laid down in this award, and the object

(a) Other facts were alleged, impeaching the conduct of the arbitrator; but, as they were explained or contradicted by the affidavits in answer, and were not relied upon in the judgment of the court, they are omitted here.

of which was that passengers might be landed from steamboats as they had previously been by means of the barges, &c. complained of in the action, but without material inconvenience to the adjoining premises. A plan was annexed.

In opposition to the rule, the attorney for the prosecutors and for the defendants in the action deposed, as to the examination of Peirce, that the water-bailiff, who gave evidence for the defendants on the indictment, had stated, as to certain questions, that Mr. Peirce, his deputy, could best answer them; and the arbitrator, referring to this statement, had asked the attorneys, respectively, whether they would call Peirce: that, on their declining to do so, the arbitrator said he thought it his duty to hear what Peirce could state, and should therefore call him, but that the parties, if they declined calling the witness, should not be at liberty to cross-examine him; that the arbitrator examined Peirce accordingly, "not per- [*642
mitting cross-examination by the attorneys, but allowing some ques-
tions to be put by Sutton in writing handed to the arbitrator himself; that the present deponent did not, after October 1st, either by himself or any other person, attend any meeting before the arbitrator, or instruct any counsel or special pleader to attend before him, nor did he know that the meeting spoken of by Sutton was about to take place; and that neither he nor his clients took any part in it, nor did he pay any fee or costs in respect of such meeting. The deponent also testified to the diligence and impartiality of the arbitrator throughout the proceedings.

Peirce made an affidavit, stating that, after his examination on 1st October, the arbitrator asked him, at the door of the room, if he could give any plan or suggestion by which, if the embankment were taken away, the accommodation of steam boat passengers, and passengers using row boats and wherries could be secured, so as at the same time to secure a right of waterway to the Salutation inn and certain other houses; when the deponent answered, that he thought he could; and thereupon the arbitrator requested him to attend with such a plan or sketch on 3d October then next; that he did so, and produced a small pencil sketch or plan to the arbitrator, who asked him questions respecting it, but did not take down any thing in writing: that no person but the deponent and the arbitrator was present at this interview, except, for about a minute, the deponent Sutton, and except, during part of the interview, the gentleman who had before attended as special pleader, and who resided at Greenwich, but was then unknown to the deponent: and that this latter gentleman took no note of the conversation, nor part in it, except that he might have made some casual observation. The deponent further stated that no [*643
communication took place between the arbitrator and himself on the matters respecting which he had been examined, except so far as was necessary for the explanation of the plan, which explanation did not occupy more than twenty minutes; that the rest of their conversation turned upon matters not in any way relating either to the plan or to the matters of the arbitration;

and that no communication on the subject of the reference took place between them after that meeting.

The attorney for the prosecutors and for the defendants in the action made a second affidavit, stating that, after the present rules had been obtained, he wrote to the arbitrator, requesting him to explain the facts alleged on moving for the rules, as to the meeting with Peirce and the special pleader on the 3d October; and inquiring whether the arbitrator would be willing to state, on affidavit, the circumstances and purpose of such meeting. He sent a similar letter to the special pleader. The arbitrator wrote in answer: "I very deeply regret I cannot comply with either of your requests. I feel an intense anxiety to explain under what circumstances, and for what purpose, I saw either of those gentlemen on the day you name; but I consider it would be improper in me to give any such explanation to any of the parties concerned. The court have the power, if they think fit, of calling upon me for an explanation; and I shall be rejoiced if they will afford me the opportunity of giving it: and, that they may not be disappointed, I will make it my object to be in court ready to give any information which may be called for by them, if you will let me know the day on which it is *arranged to dispose of these rules." The *644] special pleader answered that he felt obliged, though reluctantly, to decline making an affidavit: he expressed his conviction that, if the truth could be known, no objection could be made to that which took place; but he added that, although he was not engaged professionally in the reference after the case closed on 1st October, 1844, and was not present, or acting, on the 3d, on behalf of the prosecutors or their attorney, yet, having taken part in the reference as advocate before and on the 1st October, he was advised that he could not, consistently with professional etiquette, make any statement on affidavit connected with the case.

Platt, C. C. Jones, Serjt., M. Chambers, and Hugh Hill, now showed cause against the rules. The conference of October 3d was not a meeting, but an interview merely between the arbitrator and a person who had in the first instance been sent for by him, and was not the witness (as he is termed in the rule) of either party. The arbitrator, if he had not called in Peirce, must probably have obtained the advice of some scientific person on the point as to which Peirce was consulted; and it would have made no difference whether such person had been previously examined or not. If the arbitrator had taken the advice of a professional friend in shaping his award, no one could have disputed it on that account. A person appointed as referee to fix the value of an estate "may make use of the judgment of another upon whom he can depend; and the valuation of that person is his, if he chooses to adopt it;" *Emery v. Wase*, 5 Ves. 846, 848; (a) *Ander-son v. Wallace*, 3 Clark & Fin. 26. In *Atkinson v. *Abraham*, *645] 1 B. & P. 175, "after the evidence before the arbitrator was closed on both sides, and the plaintiff's attorney was gone, one of the defendant's

(a) See *Emery v. Wase*, 5 Ves. 505.

witnesses was re-examined, and gave a testimony different from that which he had given before, and by which the arbitrator confessed his judgment was influenced." EYRE, C. J., held this no ground for setting aside the award, unless there had been "any surprise," or the second examination had been brought about through the management of the defendant's attorney: and he said: "This is clear, that if the arbitrator thought proper to ask the witness a question for his own information after the evidence was closed, that circumstance will not induce us to set aside the award." The decision there is recognised as correct by TINDAL, C. J., in *Bignall v. Gale*, 2 Man. & G. 830. Besides, in the present case, the irregularity was known on the 3d of October, and the awards were not made till the 7th; the parties aggrieved had time to remonstrate, and ought not to have lain by. The application to set aside the award in *Bignall v. Gale*, because the arbitrators had proceeded in the absence of the defendant or his attorney, was met by a similar objection, which was held to be decisive. The presence of the special pleader in the case now before the court is unexplained, but only because he declines on professional grounds to make an affidavit. Whatever may be the effect of the alleged irregularity, it cannot vitiate the awards altogether. Mr. Peirce's affidavit points out distinctly the subject to which alone the inquiry of October 3d was directed, namely, the manner in which, after removal of the embankment, accommodation might be given to passengers embarking in and disembarking *from steam boats, or using row boats and wherries, without prejudice to certain rights of water-way. The award in *Dobson v. Groves*, so far as it regards that point, may be set aside for excess of authority, and the rest of the adjudication stand; *Manser v. Heaver*, 3 B. & Ad. 295. [*646]

M. D. Hill, (with whom were *W. H. Watson*, *Bodkin*, and *Badeley*.) contrâ. The irregularity was so great that it vitiates all the proceedings. The arbitrator did wrong, not only by conferring with a witness in the absence of the parties, but by allowing a person to be present who had attended him as advocate. If that gentleman was still an advocate, the impropriety is manifest: if he was not, he might now make an affidavit. In *Walker v. Frobisher*, 6 Ves. 70, where the arbitrator, after saying that he would examine no more witnesses, heard witnesses on the side of one party, no person attending for the other, Lord ELDON set aside the award. The arbitrator there made affidavit that the statements of these witnesses had not had the least weight with him; but the lord chancellor, though he gave credit to the statement, and admitted the respectability of the arbitrator, said that he had "been surprised into a conduct; which upon general principles must be fatal to the award:" and that "a judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind." And in the later case of *Fetherstone v. Cooper*, 9 Ves. 67, he adhered to that decision. (*Hill* was then stopped by the court.)

Lord DENMAN, C. J. An important principle is involved in this application. When the rule was moved *for, no imputation was cast [*647]

upon the motives of the arbitrator; but the facts stated throw great doubt on the validity of the award. It has been ingeniously argued that we may get rid of the difficulty by limiting the effect of the objection to certain points only; but I think that cannot be done in the present case. It is clear that the arbitrator held a meeting on the 3d of October, for the purpose of making up his mind on one of the subjects referred; and a gentleman was present who had acted as advocate in a former stage of the reference. The arbitrator said that nothing which passed on that meeting would influence his decision: but I think that no information ought to be received at all under such circumstances, unless the arbitrator has an express power reserved for that purpose, or the parties agree that he shall exercise it. The proceeding is quite different from that of consulting a legal friend on the framing of the award; that is legitimate: but here the conference is on something to be done by the consulting party, as arbitrator, on the matters referred: it turns upon a point in the cause on which a bias may be given to his mind without the possibility of its being removed. The only difficulty arises from the two cases in the Common Pleas: and I will say, without disguise, that I would rather abide by the principle which Lord ELDON lays down in *Walker v. Frobisher*, 6 Ves. 70,(a) than by those decisions. It seems that in *Atkinson v. Abraham*, 1 B. & P. 175, the opinion cited before us was not felt to be quite satisfactory; for the lord chief justice added: "Besides, this seems a matter of too little consequence to be opened again." I think that on this subject we can draw no line, but must abide by the

*648] *general principle, and oppose all attempts to explain by the bearing of particular parcels of evidence whether the inquiry had, or by any probability might have had, an effect upon the arbitrator's decision. I make no observation on the want of evidence from the gentleman who attended as special pleader; which evidence it does not appear that he might not have given. When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection. It is suggested that the complaining parties waived their right to object by not protesting before the award was made. Where an irregularity takes place at a meeting of all the parties, and is passed over, that observation may apply. But, where a party wishing to be present has been excluded from the meeting, the opportunity of setting right what was irregular is past. The mischief was done at the time, and cannot be removed.

Platt then suggested that the present decision would, at least, not affect the award upon the indictment.

Lord DENMAN, C. J. We cannot make any distinction. It is all one subject matter.

WILLIAMS and COLERIDGE, Js., concurred.(b) Rules absolute.(c)

(a) See *In re Plews & Middleton*, Hilary term, (January 29th,) post.

(b) Wightman, J., was in the Bail court.

(c) In Hilary term, January 11th, 1845, a rule was obtained calling on the defendants in the

indictment to show cause why a new trial should not be had, unless they would consent that this prosecution and the action, *Dobson v. Groves*, should be referred to another arbitrator; and why the costs of the first trial of the indictment should not abide the event of the second. In the same term, January 31st, the rule was discharged, the defendants agreeing and undertaking to be bound by the verdict of Guilty, as if the same had been adversely obtained. In Trinity term, June 12th, 1845, the defendants received judgment.

*Ex parte PARTINGTON. Nov. 23.

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When a debtor who has been taken in execution comes before a commissioner in bankruptcy to be examined after an interim order for protection under stat. 7 & 8 Vict. c. 96, the commissioner has power to remand; and that authority is incident to his power of adjudicating on the petition, and is not limited to the cases enumerated in sect. 24.

Quære, whether the benefit of stat. 7 & 8 Vict. c. 96, can be taken by a party whose effects are already vested in the provisional assignee of the Insolvent Debtors' Court under stat. 5 & 6 Vict. c. 116.

But, the commissioner having, on petition under stat. 7 & 8 Vict. c. 96, decided that the benefit of the act could not be so taken, and having therefore remanded the prisoner:

Held, (on habeas corpus and return of the commissioner's order showing the facts,) that this court could not review his decision.

A HABEAS CORPUS having issued to bring before this court the body of William Partington, detained in the Queen's prison, with the causes of his detention, the prisoner was now produced in court, and a return made, showing that he had been remanded to prison by the following order of a commissioner of the Court of Bankruptcy.

“In the Court of Bankruptcy.

“London, 27th day of September, 1844.

“In the matter of William Partington, late of,” &c., “solicitor, afterwards of the Fleet prison, in the city of London, and late of the Queen's prison, in the county of Surrey, out of business, an insolvent debtor, not being a trader within the meaning of the laws relating to bankrupts.

“Before Mr. Commissioner Evans.”

“Whereas the said William Partington, having filed his petition, and obtained an interim order for protection from process under the statute passed,” &c., (5 & 6 Vict. c. 116,) “‘for the relief of insolvent debtors,’ and under another statute passed,” &c., (7 & 8 Vict. c. 96,) “‘to amend the law of insolvency, bankruptcy, and execution,’ an order of this court, bearing date the 23d day of August last, was made, whereby it was ordered that the keeper of the Queen's prison, or any officer who should have the said William Partington in *custody by virtue of the several executions for debt, or any of them, in the said order mentioned, should discharge [*650 the said William Partington out of custody as to such executions, pursuant to the said last mentioned statute; and whereas, pursuant to notice for that purpose duly given, the said William Partington this day appeared in court for his first examination, and upon such his examination it appeared to this court that he had recently petitioned the Insolvent Debtors' Court, and that all his estate and effects were now vested in the provisional assignee of that court under the vesting order, and that proceedings are there pending, I

refuse the final order: and it is therefore ordered, in pursuance of the said last mentioned statute, that the said William Partington be remanded to his former custody as to such of the several executions for debt, upon the judgments in the said recited order mentioned, as would now remain in force in case the said order had not been made; for which purpose it is further ordered that Charles Cutten, one of the messengers of this court, or one of his assistants, do take the said William Partington and forthwith convey him to the Queen's prison, there to be detained upon such executions as aforesaid.

JOSHUA EVANS,

"Commissioner."

Peacock now moved (a) that the prisoner should be discharged; and *Lush* was heard, contra. The points urged, and the material facts not already stated, will appear sufficiently from the judgment of the court.

Cur. adv. vult.

*651] "In the vacation after this term, (December 4th,) judgment was delivered as follows by

Lord DENMAN, C. J. The prisoner in this case has been brought up on habeas corpus: and from the affidavit made by himself on moving for the writ, and the return, the facts appear to be that, in 1841, he was committed to the Fleet in execution for non-payment of between 500*l.* and 600*l.* pursuant to a rule of this court, and was also detained in execution on two other writs of ca. sa., one of which, at least, certainly issued in an action for the recovery of a debt; the first endorsed to levy 50*l.* damages with interest on 36*l.* 11*s.*, the other 58*l.* 13*s.* with interest on 37*l.* 17*s.* In August last, he petitioned the Court of Bankruptcy under stat. 7 & 8 Vict. c. 96, (b)

*652] and on that day obtained his *discharge from custody with an interim order of protection from process, to expire on the 27th September following. On that day he appeared for examination before the court; and Mr. Commissioner Evans then made an order, whereby, after reciting that, upon his examination, it appeared that he had recently petitioned the

(a) Before Lord Denman, C. J., Williams and Coleridge, Js.

(b) Stat. 7 & 8 Vict. c. 96, s. 6, enacts, "That any prisoner in execution upon any judgment obtained in any action for the recovery of any debt, either not being a trader within the meaning of the statutes relating to bankrupts, or being a trader within the meaning of the said statutes, owing debts amounting on the whole to less than 300*l.*, may be a petitioner for protection from process; and every such petitioner to whom an interim order for protection shall have been given shall not only be protected from process, as provided by the said recited act," (5 & 6 Vict. c. 116,) "but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule; and if any such petitioner, being a prisoner in execution, shall be detained in prison in execution upon any such judgment, it shall be lawful for the commissioner to order any officer who shall have such petitioner in custody by virtue of such execution to discharge such petitioner out of custody as to such execution, without exacting any fee, and such officer shall hereby be indemnified for so doing;" "and such petitioner so discharged shall be protected by his interim order from all process for such time as the commissioner shall by such interim order or any renewal thereof think fit to appoint, until the making of the final order for protection, in the same manner as if such petitioner had not been a prisoner in execution: Provided always, that after the time allowed by any such interim order or any renewal thereof (as the case may be) shall have elapsed such petitioner shall by such discharge be protected from being again taken in execution upon such judgment such judgment shall remain in full force and effect notwithstanding such discharge."

Insolvent Debtors' Court, and that all his estate and effects were now vested in the provisional assignee of that court under the vesting order, and that proceedings were there pending, he refused the final order, and therefore ordered, in pursuance of the statute, that he should be remanded to his former custody as to such of the several executions as would then remain in force if the said interim order had not been made. The legality of this order of remand is now the matter in question.

On the part of the prisoner it is first contended that, under any circumstances, his present detention is illegal, for that it appears he has on each writ been detained more than twelve calendar months, but that, by the proviso to the 28th section of stat. 7 & 8 Vict. c. 96, (a) it *is expressly and in general terms enacted that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition, in case the final order shall be refused; and in this case the final order has been refused. But we are of opinion that this case does not fall within the proviso, which must be construed with reference to the preceding parts of the clause to which it is appended. Three cases are put in the commencement. First, the *naming no day for making the final order, for any of the causes specified in the 24th section. Secondly, the adjournment of the consideration of the final order sine die. Thirdly, the refusal of the final order. This

(a) Stat. 7 & 8 Vict. c. 96, s. 24. "Provided always, and be it enacted, that if on the day for the first examination of the petitioner, or at any adjournment thereof, it shall appear to the commissioner that the debts of the petitioner, or any of them, were contracted by any manner of fraud or breach of trust, or by any prosecution," &c. (enumerating several other cases,) "or that the petitioner has parted with any of his property since the presenting of his petition, the commissioner shall not be authorized in any such case to name any day for making such final order, or to renew such interim order; and in every such case wherein any such petitioner shall have been a prisoner in execution, and discharged out of custody by order of the commissioner under the provision herein in that behalf contained, such petitioner shall be remanded by an order of the commissioner to his former custody; but if none of the matters aforesaid shall so appear, and the commissioner shall be satisfied that the petitioner has made a full discovery of his estate, effects, debts, and credits, it shall then be lawful for the commissioner to cause notice to be given that on a certain day, to be named therein, he will proceed to make such final order, unless cause be shown to the contrary."

Sect. 27 enacts "That it shall be lawful for the commissioner, at the time appointed for making the final order for protection from process, or at any adjournment thereof, to adjourn the consideration of such final order sine die."

Sect. 28 enacts "That if for any of the causes in that behalf aforesaid no day be named for making the final order, or if the consideration of such final order be adjourned sine die, or such final order be refused, the commissioner shall have the power, after the expiration of such time subsequent to the filing of the petition as, having regard to all the circumstances of the insolvency, and the conduct of the petitioner as an insolvent debtor before and after his insolvency, the commissioner shall think just, and after hearing the petitioner or any of his creditors, or his or their counsel or attorneys, to make an order to protect the petitioner from being taken or detained under any process whatever for or in respect of the several debts and sums of money due or claimed to be due at the time of filing his petition, from the said petitioner, to the several persons named in his schedule as creditors or as claiming to be creditors for the same respectively, or for which such persons should have given credit to the said petitioner before the time of filing his petition, and which were not then payable, and as to the claims of all other persons not known to the said petitioner at the time of making such order, who may be endorsers or holders of any negotiable security set forth in his said schedule: Provided always, that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition, in case the final order shall be refused or shall not be made, or in case the protecting order shall not be renewed."

case does not fall within the two first; but, as to all three, the section goes on to give the commissioner a power analogous to that which the Insolvent commissioners have, of making an order to protect the prisoner from arrest or detention, to take effect after a time to be named in such order. The proviso is in restraint of that power, and limits the period during which the prisoner shall be liable to imprisonment to the period of twelve months. This liability is in the nature of punishment, and is clearly prospective; and, if the commissioner had found any reason in the circumstances to justify him in so doing, he might have made such postponed order, and the prisoner could not have claimed his discharge till the end of twelve months from the date of the order. No such order, however, has been made. The commissioner has evidently proceeded on the ground that, upon examination, the prisoner's case does not bring him within the benefit of the act: that the first order for discharge and protection issued improvidently, and, therefore, that, by a power incidental to the jurisdiction, and not in terms given by the act, the prisoner both might be and ought to be remanded to his original custody.

This raises the prisoner's two remaining points. He contends, first, that at all events there was no power to remand: that he was a prisoner in execution upon a judgment in debt, and he was not a trader; that he had therefore a *prima facie* right to petition, and that such right brought him within the jurisdiction of the court, *not generally, but as limited by the
 *655] act; that the discharge from custody under the act is absolute, and that, under it, there is no power to imprison by the court except under sect. 24, the act, in all other cases, only saving the rights of creditors to retake in execution upon their judgments when the interim order shall have expired and shall not be renewed: (a) to them, he says, his case should have been left by the court, which had ceased to have any power over him as soon as the interim order had expired, and it had declined to proceed any farther with his case. Secondly, he contends that, having brought himself, in the first instance, within the jurisdiction of the court under the 6th section, nothing but some one of the causes specified in the 24th would justify the commissioner from proceeding in due course to name the day for making the final order.

We are clearly of opinion against the prisoner on the first point. The discharge and the interim order are founded entirely on the petition, which suffices to bring the prisoner within the jurisdiction of the court in the first instance, but, being *ex parte*, when the day of examination comes, must be liable to contradiction; and the commissioner may find that allegations in it, essential to the proceeding, are untrue; as, for example, it may turn out that the prisoner is a trader, and his debts exceed 300*l.*: in this case the petition will be dismissed; and it is necessarily incidental to the power of deciding upon this, that the court should have power to remand the prisoner, otherwise it might be made the engine of a great fraud on creditors,

without the means of remedying the evil, with the prisoner in person before it. It *seems to us that the power of remand is involved in the power of discharge, as soon as ever it appears that the order for [*656 discharge has improperly issued.(a) This answer to the prisoner's first point equally applies to the second.

There still remains the question whether the commissioner has rightly decided that the prisoner's case was not within the act : (b) but this was a question which he had jurisdiction to inquire into and decide : he has done so ; and we are not authorized to review his decision. We by no means intimate a doubt of the propriety of that decision : we simply express no opinion upon it. It may be that there may be no court competent to review it ; or it may be that by the chief judge or the lord chancellor the merits of the decision may be reviewed. It is clear only that we have not that power. The prisoner, therefore, must be remanded. Prisoner remanded.(c)

(a) Lush, in obtaining the discharge, argued that the effect of sect. 24 was not to confer a power of remanding in certain cases, and those only, but to oblige the commissioner to remand in the particular cases there specified.

(b) On this point it was urged, in support of the commitment, that stat. 7 & 8 Vict. c. 96, was available to such persons only as could offer a distribution of their effects under that statute. Sect. 2 and Sched. (A. No. 1) were referred to. The argument for the prisoner was, that the act was intended to protect any person who did all in his power to comply with its provisions ; and that, if the prisoner had petitioned the Insolvent Debtors' Court before stat. 7 & 8 Vict. c. 96 passed, (and there was no statement to the contrary,) it would be hard that he should therefore lose the benefit of the new act, whatever the effect of that petition might be upon his property.

(c) See *Ex parte Partington*, 13 M. & W. 679.

*The QUEEN v. The Commissioners of Stamps and Taxes. [*657
Nov. 23.

By an instrument purporting to be the will of S. deceased, the whole of S.'s personalty, amounting in the net to 12,748*l.*, was bequeathed to J., a stranger in blood, who was made executor. J. took out probate, and paid the duty of 10 per cent. on the whole net. Afterwards T., the next of kin to S., disputed the will, on the ground that S. was not of disposing mind. J. paid 6000*l.* to T., and consented that the will should be revoked, and administration taken out by T., who, in consideration thereof, released to J. her claim on the 12,748*l.* T., from her nearness in blood, was liable to a duty of less than 10 per cent.

Held, that, under stat. 36 G. 3, c. 52, s. 37, J. was entitled to a return of duty, not only on the 6000*l.*, but also on the remaining 6748*l.*, and that the duty on the whole 12,748*l.* was to be accounted for between T. and the commissioners of stamps, as duty charged on T., at the lower rate.

KELLY, in last term, obtained a rule calling on her majesty's commissioners of stamps and taxes to show cause why a mandamus should not issue, commanding them to repay to William Jackson, Lyon Falkener and Joseph Tredgett the sum of 1274*l.* 17*s.* 9*d.*, out of any moneys in their hands arising from the duties imposed by stat. 36 G. 3, c. 52, or the former acts therein recited, or to allow that sum in account with Katherine Mary Tavener, administratrix of John Stracey, deceased, and to deem the same payments in due course of administration by her, and to pay any surplus of the said sum, remaining after such allowance, to the said William Jackson, Lyon Falkener, and Joseph Tredgett.

By the affidavits on which the rule was obtained the following facts appeared. On 31st July, 1839, John Stracey died, possessed of real property in Cambridgeshire, of the value of about 2500*l.*, and of personal property to the amount of about 13,000*l.* By an instrument, purporting to be his will, all his real and personal property was given and bequeathed to Jackson, Falkener, and Tredgett, then heirs, executors and assigns: and the three were appointed executors. They proved the will in the Prerogative Court of Canterbury, swearing the personal property to be under 14,000*l.* About 3d April, 1841, they carried in their residuary account, *658] showing a net *amount of personalty of 12,748*l.* 17*s.* 9*d.*; and, being strangers in blood to the deceased, they paid, as ten per cent.(a) on this residue, 1274*l.* 17*s.* 9*d.* to the commissioners of stamps and taxes. Afterwards, Henry William Wilson, the heir at law of John Stracey, brought ejectment against Jackson, Falkener, and Tredgett, for the real estate of the deceased. The action was tried at the Cambridgeshire Spring assizes, 1843; when evidence was given, on the part of the plaintiff, to show that John Stracey was not of sound mind at the time of executing the alleged will; and the jury thereupon found a verdict for the plaintiff. A rule nisi for a new trial was obtained in the Easter term following, on points unconnected with the question of Stracey's state of mind; which rule had been since abandoned. In March, 1843, Katherine Mary Tavener, the next of kin to Stracey, caused a citation to be issued out of the Prerogative Court of Canterbury against Jackson, Falkener, and Tredgett, calling upon them to bring in the probate of the alleged will, and to show cause why such probate should not be revoked and administration granted to the next of kin. On 3d June, 1843, the probate was revoked by the Prerogative Court; and, on 9th June, 1843, administration was granted to K. M. Tavener. After the commencement of these proceedings by K. M. Tavener, and before the revocation of the probate, certain agreements were made between K. M. Tavener and her husband, and Jackson, Falkener, and Tredgett, the effect of which was that the probate should be revoked and K. M. Tavener take out administration, that 6100*l.* should be paid by Jackson, Falkener, and Tredgett, to *K. M. Tavener, and that they *659] should also assign to her all the moneys paid by them on account of legacy or probate duty; and that she and her husband, in consideration thereof, should acquit, release and discharge Jackson, Falkener, and Tredgett, from the sum of 12,748*l.* 17*s.* 9*d.* returned by them as the residuary estate of J. Stracey; all of which was accordingly done. Wilson also gave up his claim on the real estate, for the sum of 2350*l.* Afterwards, Jackson, Falkener, and Tredgett applied to the commissioners of stamps and taxes for a return of the 1274*l.* 17*s.* 9*d.*; but the commissioners refused to return more than 610*l.*, being ten per cent. on the 6100*l.* paid by Jackson, Falkener, and Tredgett, to K. M. Tavener.(b)

(a) Stat. 55 G. 3, c. 184. Sched. part III.

(b) Stat. 36 G. 3, c. 52, s. 23, enacts, "That where any legacy, or part of any legacy, "

*Sir *F. Thesiger*, solicitor-general, and *Crompton* now showed cause. The question is, whether the commissioners are bound to take the whole duty from the administratrix, or are entitled to keep the duty paid by the parties named executors on so much as they have retained. The administratrix, by reason of her consanguinity,^(a) will pay less than 10 per cent.; and the commissioners are advised that the utmost that can be contended for is, that the duty paid on the sum actually *handed over to her should be returned to the parties who paid it, and the administratrix charged in respect of such sum. The question turns upon stat. 36 G. 3, c. 52; and the only sections which can be important are 23, 34, and 37. Now sect. 37 is not applicable, because the authority under which the money was paid to the commissioners is not avoided: it was paid under the will; the probate is revoked; but that does not avoid the will. The commissioners have treated this as either a release or composition under sect. 23, or a refunding under sect. 34; and it is very doubtful whether they did not give up too much in doing so. But, admitting that, upon a

residue or part of residue, whereon any duty shall be chargeable by this act, shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount or value thereof, then and in such case, the duty shall be charged and paid in respect of such legacy, or part of legacy, or residue, or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same: provided always, that if any legacy or bequest shall be made in satisfaction of any other legacy, or bequest, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty."

Sect. 34 enacts, "That if at any time after payment of duty on any legacy, or residue, or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy or part of legacy, or any residue of any personal estate hath been received or retained, shall be obliged to refund the same, or any part thereof, then in every such case it shall be lawful for the said commissioners of stamp duties, and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over payment of duty, to settle and adjust the amount of such over payment, and to repay the same out of the money in their hands, arising from the duties by this act imposed, or to allow the same in future payments as the case may permit or require."

Sect. 37 enacts, "That if the authority under or by colour of which any person shall have administered the estate or effects of any person deceased, or any part thereof, shall be void, or be repealed, or declared void, and such person shall, before the avoidance, repeal, or declaration of avoidance, have paid any duty hereby imposed, or any duty imposed by any of the said former acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof to the satisfaction of the said commissioners of stamp duties, be repaid to the person or persons who shall have paid the same, or his, her, or their representatives, by the said commissioners, out of any moneys in their hands arising from the duties imposed by this act, or the said former acts; but in case such duty ought to have been paid by the rightful executor or executors, administrator or administrators, of such deceased person, then and in such case the payment of such duty shall be valid and effectual notwithstanding such avoidance, repeal, or declaration of avoidance as aforesaid; and no such person shall, by reason of the avoidance, repeal, or declaration of avoidance of such authority, be sued, molested, or troubled for or in respect of such payment; but all such payments, in respect of the said duty, shall be allowed in account with such rightful executor or executors, administrator or administrators, and the same shall be deemed payments in the due course of administration, as fully and effectually as if such payments had been made by rightful executors or administrators; any law, usage, or custom, to the contrary notwithstanding."

(a) In the ecclesiastical proceedings, she was styled cousin german, once removed, of *Stacey*.

liberal construction, the case might be brought within the equity of either of those sections, the claim for repayment can be applicable only so far as the composition or refunding has taken place. As to what the parties named in the will retain, they clearly cannot contend that the will is void ; for that would be setting up their own wrong. And legatees, strangers in blood, might always defraud the revenue, by allowing a near relative to set aside the will upon terms and take out administration, and then insisting that the whole duty was to be charged only as against the party taking out administration.

Kelly, (with whom was *Gunning*,) contra. The case is within the thirty-seventh section. The parties paid as executors ; their authority as executors is avoided by the revocation of the probate and the grant of administration to the next of kin. The sum which they retain is not held by them under the will : it was the property of the next of kin, who, however, choose to *662] give up so much rather than incur the risk and expense of litigation. *It is either a gift, or the price paid for the compromise : but on neither view can the parties who now hold it be liable upon it as for a legacy. On the other hand, the administratrix must pay, not only on the sum which she has retained, but on all the net estate, including that which she has allowed the other parties to retain. A balance therefore is due from the commissioners, on account of the difference of duties ; which they may satisfy by any of the modes suggested in this rule. It is true that, if such an arrangement were fraudulent or collusive, the claim would not be allowed : but that is not suggested ; and indeed the facts negative such a supposition. If there were any doubt, that construction would be least favoured which imposes a tax on the subject. (He was then stopped by the court.)

Per Curiam.(a) We think the case is within sect. 37. Probably it will not be necessary to make the rule absolute.

The solicitor-general assented.

(a) Lord Denman, C. J., Williams and Coleridge, Js.

*663]

*TWYLCROSS v. KING. Nov. 25.

Plaintiff, having delivered a replication to several pleas, concluding to the country as to each plea, but traversing one with a special inducement, added the similiter, made up and delivered the issue, and gave notice of trial. Defendant struck out the similiter, and gave notice thereof to plaintiff, but did not deliver a rejoinder or notice of his intention to rejoin. Afterwards defendant cravedoyer of an indenture mentioned in the special inducement, and delivered a rejoinder with a demurrer to the replication containing that inducement, and a similiter as to the rest ; and also gave notice that he should not appear on the trial, but should move to set aside any trial had. Plaintiff proceeded to trial, and obtained a verdict, defendant not appearing.

The court set aside the verdict and trial, with costs.

BOVILL, in last Easter term, obtained a rule calling on the plaintiff to show cause why the record, trial, and verdict, in this cause, should not be set aside for irregularity, with costs.

The following facts appeared on affidavit. The declaration was in trespass; to which six pleas were pleaded. The fifth plea alleged that a certain dwelling-house was the dwelling-house, soil and freehold of one John Muskett; that, just before the time when, &c., the plaintiff, with a strong hand, illegally and against the will of the said J. M., entered, and wrongfully intruded himself, and was continuing and remaining, thereon, without the license and against the will of J. M., making a noise, &c.; and it justified the commission of the trespasses, in order to remove plaintiff, by defendant as the bailiff and by the command of J. M. Verification. The sixth plea alleged that Mary Stevens, at the time when, &c., was lawfully possessed, and in the actual occupation, of the dwelling-house; and then, as before, alleged the entry of plaintiff, and justified the commission of the trespasses by the command of M. S. Verification.

On 7th March, 1844, plaintiff replied, joining issue on the first four pleas. To the fifth plea he replied that, before J. M. had any thing in the dwelling-house, Sarah Godbold was seised thereof in her demesne as of fee, and, by indenture, (of which profert was made,) *demised it for twenty-one years to plaintiff; that plaintiff entered, and afterwards demised to Mary Stevens from year to year; that M. S. entered and continued possessed; that rent was in arrear from M. S. to plaintiff at the same when, &c.; that plaintiff, while M. S. was in possession, entered to distrain; and that, while plaintiff was making such distress, defendant, of his own wrong, committed, &c., in manner and form as plaintiff complained, &c., without this, that plaintiff, at the time when, &c., illegally and with a strong hand, &c., in manner and form as in the fifth plea alleged: conclusion to the country. To the sixth plea plaintiff replied that, though true it is that M. S. did command defendant, &c., yet defendant of his own wrong, and without the residue of the cause, &c., committed, &c. Conclusion to the country. [*664

On the same 7th March, plaintiff delivered the issue, with the similiter added by himself, and notice of trial for the then next Surrey assizes. On 11th March, defendant gave a written notice to plaintiff that he, defendant, accepted the issue as a replication only, and that the similiter had been accordingly struck out. They had in fact been struck out before giving the notice; and no application had been since made to restore them, nor any fresh issue delivered. Afterwards, on the same day, defendant made a written demand of oyer and copy of the indenture mentioned in the replication to the fifth plea. Afterwards, on the same day, plaintiff gave defendant written notice that he should proceed to trial, according to issue joined and notice served, and should disregard the striking out of the similiter. Defendant afterwards took out a summons calling on plaintiff to show cause why the similiter should not *remain struck out till oyer and copy should have been delivered, or why all further proceedings should not be stayed till the fifth day of the next term. On 13th March, plaintiff delivered oyer and copy. On 15th March, the summons [*665

was attended before **ERSKINE, J.**, who intimated that the plaintiff had a right to proceed at his peril, and made no order. On the same day defendant delivered to plaintiff a rejoinder, joining issue on the replication to the sixth plea, and demurring specially to the replication to the fifth plea. This rejoinder the plaintiff returned to the defendant. On 22d March, defendant gave plaintiff a written notice that he, defendant, would not appear at the assizes, and that plaintiff, if he carried down the cause for trial, would do so at his peril, and defendant would move to set aside any trial that might be had, and all proceedings thereon.

The plaintiff proceeded to trial at the Surrey Spring assizes, and obtained a verdict, defendant not appearing.

Platt now showed cause. The defendant, when he struck out the similiter, ought to have delivered his rejoinders, or given notice that he would rejoin in due time. Where the defendant substitutes nothing for the similiter, the plaintiff is entitled to retain the issue. Here, the defendant should have struck out the similiter to the rejoinder to the fifth plea, and demurred; 2 Tidd's Pr. 726, (9th ed. ;) Tidd's Practical Forms, 241, (8th ed.) [**COLERIDGE, J.** Should you not have signed judgment for want of a rejoinder?]

*666] **Kelly* and *Bovill*, *contrà*, were stopped by the court.
Per Curiam.(a)

Rule absolute.

(a) Lord Denman, C. J., Williams, Coleridge, and Wightman, Ja.

STULZ and Another v. Sir H. R. WYATT, Knight. Nov. 25.

After motion to reverse an outlawry has been discharged, the court will not reverse it on a new motion founded upon affidavits not stating any fact subsequent to the first application, but will put the defendant to his writ of error.

SIR JOHN BAYLEY, in this term, obtained a rule calling upon the plaintiffs to show cause why the proceedings in outlawry in this cause should not be set aside for irregularity, with costs. The application was made on the ground that the proclamations had not been affixed on or near to the doors of the churches and chapels in the proper parish, as directed by stat. 7 W. 4, & 1 Vict. c. 45, s. 2; and also because the writ of proclamations ordered the sheriff to cause the defendant "to be proclaimed upon the several days, according to the form of the statutes for such purpose made in the thirty-first year of the reign of Elizabeth, (31 Eliz. c. 3.) late queen of England, and in the first and second year of the reign of her present majesty Queen Victoria," (instead of 7 W. 4, & 1 Vict.) It appeared, however, from affidavits in opposition to the rule, that a previous rule nisi had been obtained for reversing the outlawry, which rule had been, in

Michaelmas term 1843, discharged with costs, after a hearing "upon the merits." (a)

* *W. H. Watson* now showed cause, and contended that a second application could not be complied with. He referred to *Regina v. The Manchester and Leeds Railway Company*, 8 A. & E. 413, 419; *Rex v. Orde*, 8 A. & E. 420; *Joyes v. Collinson*, 13 M. & W. 558, 559; and *R. K. B. Hil.* 3 Ja. 1. (b) [*667]

Sir *J. Bayley*, contra, as to the ground of his present motion, relied on *Regina v. Whipp*, 4 Q. B. 141: and, as to the objection to a second application, contended that the court could not, in the case of outlawry, act strictly on the alleged practice, but would, on motion, reverse an outlawry which clearly would be reversable on error. He also mentioned that he had stated the fact of the former application when he obtained the present rule.

Per Curiam. (c) We cannot reverse upon motion, after a previous application has failed. The defendant must bring error.

Rule discharged, without costs. (d)

(a) A summons for the same purpose had been previously obtained, which was heard before *Coltman, J.*, at chambers, when his lordship declined to make any order for reversing the outlawry except upon payment of costs and entering a common appearance; and no such order was drawn up.

(b) *Peacock's Rules and Orders*, K. B. 3. See also *Regina v. The Great Western Railway Company*, 5 Q. B. 597.

(c) *Lord Denman, C. J., Williams, Coleridge, and Wightman, J.*

(d) See *Ex parte Thompson*, p. 721, post.

*MICHAELMAS VACATION. (a)

[*668]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

ROWLEY v. The QUEEN on the Relation of SMITH. Nov. 26.

A councillor to fill up an occasional vacancy under stat. 5 & 6 W. 4, c. 76, s. 47, and councillors to replace the third part of the council annually going out of office, ought not to be chosen at one and the same election. Stat. 7 W. 4, & 1 Vict. c. 78, s. 11, does not prospectively sanction such a proceeding.

An election having been held to fill up an occasional vacancy and the ordinary ones at the same time, a quo warranto information was brought against a party claiming to have been elected to fill one of the ordinary vacancies. Issue being joined on averments raising the question whether he was duly elected, it appeared on the trial that voting papers were delivered containing the particulars required by stat. 5 & 6 W. 4, c. 76, s. 32, that the defendant was named in a majority of such papers, and that the presiding alderman and assessor declared him and two others elected to fill the ordinary vacancies, and a fourth party to fill the occasional one. Defendant endeavoured to show by this and other evidence that the voters understood, at the time of the election, which persons were candidates to fill the ordinary and the occasional vacancies respectively, and that they gave their votes accordingly. The judge told the jury

(a) The Court of Queen's Bench sat in banc on Wednesday, December 4th, and gave judgment in the case *Ex parte Partington*, reported anti, p. 649.

that the information which enabled the presiding officers to declare defendant elected to fill an ordinary and not the occasional vacancy was by law to be derived from the voting papers alone.

Held, on bill of exceptions and writ of error to the Exchequer Chamber, that the direction was right. Judgment for the crown affirmed.

On writ of error to the Exchequer Chamber upon judgment on a quo warranto information, the party in whose favour the Court of Error decides is not thereby, and by stat. 11 G. 4, & 1 W. 4, c. 70, s. 8, entitled to enter up a judgment of that court for his costs in error.

QUO WARRANTO information for exercising the office of a councillor of the borough and city of Lichfield.(a)

Plea, (in substance,) that the borough is divided into two wards, the North and South, each having nine councillors assigned to it under stat.

5 & 6 W. 4, c. 76, s. 40; *that Rowley was elected a councillor

*669] for the South ward on November 1st, 1838, and served till November 1st, 1841. That one William Taylor, who was elected a councillor on

November 2d, 1840, (the 1st being Sunday,) absented himself from the borough, and his office thereupon was declared and became void according to the statute, (s. 52,) on 30th October, 1841. That, on November 1st,

1841, one third part (namely three) of the councillors who had been longest in office without re-election, and of whom Rowley was one, went out of office; and on the same day an election of three councillors to supply their

places, and also (by previous appointment of Thomas Adie, the alderman of the ward) an election of one councillor to supply the vacancy made by

Taylor, were duly held before the said alderman and William Vale, then sole assessor of the South ward. That Rowley, being qualified, was a

candidate to be re-elected councillor to supply the place and office of councillor out of which he had gone as aforesaid. That the burgesses did

openly assemble at such election, and, well knowing Rowley to be such candidate as last aforesaid, "did then and there re-elect and choose the

said Thomas Rowley to be a councillor of the borough and city in the said South ward; and a majority of the said burgesses entitled to vote at the

said election did then and there deliver to the said T. Adie and W. Vale, who as such alderman and assessor as aforesaid then presided at the said

election, their respective voting papers, containing the christian and surnames of the persons for whom they respectively voted, not exceeding the

number of councillors then to be chosen as aforesaid, with their respective places of abode and descriptions, including therein the christian name and

*670] surname of the said T. Rowley, *with his place of abode and description; such papers respectively being previously signed with

the name of the burgess voting, and with the name of the street, lane or other place in which the property for which he appeared to be rated on the

burgess roll of the said borough and city was then situated, according to the provisions of the said act: and that, at the conclusion of the said

election, the said T. Adie and W. Vale, as such alderman and assessor as aforesaid, did then and there, according to the provisions of the said act,

(a) See the argument and judgment on the motion for a quo warranto information, *Regin v. Rowley*, 3 Q. B. 143.

examine the voting papers delivered to them at the said election, and did then and there ascertain and declare the said T. Rowley to be one of the persons having the greatest number of votes at the said election, and to be duly elected a councillor of the said borough and city in the said South ward." The plea then stated that the alderman and assessor did, within the time limited by the act, to wit on, &c., publish a list of the names of the persons elected at the said election, in which list the name of him the said T. Rowley was inserted as one of the persons elected as a councillor of the said borough and city for the said South ward; and that Rowley made and subscribed the declaration, &c., and took upon him the office, and became and was and still is a councillor of the said borough and city; by virtue whereof, &c.; without this, that he the said T. R. had usurped, &c., in manner, &c. Verification.

Replication. 1. That the burgesses of the said South ward did not duly re-elect and choose him the said T. Rowley to be a councillor of the said borough and city in the said South ward, in manner and form, &c. Conclusion to the country. Issue thereon.

2. That a majority of the said burgesses entitled to vote at the said election did not deliver to the said T. *Adie and W. Vale their respective voting papers according to the provisions of the said act, [*671 in manner and form, &c. Conclusion to the country. Issue thereon.

3. That the said T. Adie and W. Vale did not ascertain and declare the said T. Rowley to be one of the persons having the greatest number of votes at the said election, and to be duly elected a councillor of the said borough and city in the said South ward, in manner and form, &c. Conclusion to the country. Issue thereon.

The information was tried before TINDALL, C. J., at the Stafford Summer assizes, 1842, when the defendant's counsel tendered a bill of exceptions. A verdict was found, and judgment given, for the crown on all the issues; and the defendant brought error in the Exchequer Chamber. The bill of exceptions set forth the proceedings on the trial. The evidence on which the exception arose was then stated as follows.

"And, upon the trial of those issues, the counsel learned in the law for the said T. Rowley, to maintain and prove the said issues on his part, produced one Charles Simpson, a witness, who gave evidence that the said William Taylor was elected," &c. (stating the occurrence of the extraordinary and ordinary vacancies in 1841 :) "That, shortly before the election hereinafter mentioned, a public meeting of the burgesses of the said borough of Lichfield, and to which all the burgesses who chose to come had access, and at which there were pipes and ale, and which was not held in the way in which meetings of the corporation of the said borough and city usually are held, took place at an inn in the said borough of Lichfield, called the George, of which meeting public notice had previously been given in order that the candidates for election as councillors *at the election, which it was then known was about to take place, might be declared and [*672 proposed to be burgesses of the said borough. That at such meeting the

said T. Rowley, one Frederick Bond and one William Edward Vale were proposed expressly as candidates to supply the three ordinary vacancies caused," &c. (as before stated;) "and that, at the said meeting and after an interval of about half an hour after the last mentioned proposal, one William Gorton was proposed expressly as a candidate to supply the vacancy caused by the avoidance of the said office of the said W. Taylor. That all the persons present at that meeting were of one party except perhaps five or six. That, notice having been given that the election of a councillor to supply the place of the said W. Taylor would take place on the said 1st of November, being the same day on which the election of councillors to supply the ordinary vacancies was to take place, such election for the purpose of supplying all four vacancies was held before T. Adie, Esquire, and W. Vale, in the said plea mentioned, and that one hundred and forty, being a majority, of the burgesses entitled to vote at the said election, did then deliver to the said T. Adie and W. Vale, who as such alderman and assessor as in the said plea mentioned then presided at the said election, voting papers containing the christian names and surnames of the persons for whom they respectively voted, and amongst others the christian and surname of the said T. Rowley, with their respective places of abode and descriptions; such papers respectively being previously signed with the name of the burgess voting, and with the name of the street, lane or other place in which the property for which he appeared to be rated on the burgess roll of the said borough of *Lichfield was situated. That each of such *673] voting papers contained the names of four candidates as the persons voted for, and with the exception only of the signatures and places of abode of the persons voting, and with the exception of about twelve of the said one hundred and forty, in which some names other than Bond, Vale and Gorton were inserted to make up the four along with that of Rowley, was in the words and figures, and in the form following, that is to say:

1841. South Ward.

I vote for

Frederick Bond, Butcher Row, Attorney at Law, Thomas Rowley,
Tamworth Road, Physician, William Edward Vale, Boar Street,
Clock Manufacturer, William Gorton, Lombard Street, Builder.

Signed

_____ of _____.

That one hundred and one burgesses of the said South ward voted for William East Holmes, Richard Walthew and William Greene in voting papers containing the names of those three persons and no more, with their respective places of abode and descriptions, in form as follows, that is to say:

1st November, 1841. South Ward.

I vote for

William East Holmes, of _____, Coach Builder, Richard
Walthew, of _____, Gentleman, William Greene of St.
John Street, Solicitor, to be councillors for the South ward of the
city of Lichfield.

Signed

_____.

And that each of those three persons had twelve or thirteen other votes in voting papers containing each three names, but not the same three which have been last mentioned. And it was further in evidence that one of the burgesses of the said South ward gave in a voting paper [674 in which he voted for John Garrett, a burgess of the said South ward, alone, and which voting paper was in form as follows.

South Ward. 1st November, 1841.

I vote for John Garrett, Boar Street, tailor and draper, to supply the vacancy occasioned by the absence of William Taylor.

(Signed by the voter.)

That several of the burgesses who had already voted for Holmes, Waltheu and Greene in the above mentioned voting papers containing each three names, subsequently tendered voting papers, similar to that lastly above set out, in favour of the said John Garrett to supply the said occasional vacancy; but that some were torn, and all rejected.

That after the said election the said T. Adie and W. Vale did examine the voting which had been delivered to them by the burgesses, but not including those which had been rejected as aforesaid, and finding the numbers to be as aforesaid, did thereupon, by words without writing, publicly declare that the said F. Bond, T. Rowley and W. E. Vale were elected councillors to fill the three ordinary vacancies, and that the said W. Gorton was elected as a councillor to supply the place of the said W. Taylor.

And thereupon the said lord chief justice, before whom the said issues were tried, held, and informed the jury, that the said alderman and assessor ought, in point of law and on the true construction of the acts regulating municipal corporations, to have obtained the *information which enabled them to declare that the defendant was re-elected in his [675 own place, and not to supply the place of the said W. Taylor, from the voting papers alone: and thereupon the counsel for the said defendant excepted to the said holding and direction of the said lord chief justice because he so held and informed the jury as aforesaid, whereas the said counsel insisted he ought to have informed the jury that, if the alderman and assessor had informed themselves by any other means that the defendant was a candidate for re-election to succeed to the office of councillor vacated by himself, and not to supply the place of the said W. Taylor, and that the burgesses voting knew that fact and delivered their voting papers with that knowledge, the voting papers were sufficient, and the manner in which the names were entered therein furnished no objection to the validity of the election. And the said jury did thereupon by the direction of the said lord chief justice find a verdict for the crown on all the said issues."

The special assignments of error were that the lord chief justice held, and informed the jury, &c., (setting forth his ruling, as above stated,) "whereas, in point of law, and on the true construction of the acts regulating municipal corporations, if the said alderman and assessor had informed themselves," &c., (stating the opposite proposition as in the bill of

exceptions :) "and whereas it was not necessary that the said alderman and assessor should have obtained the information which enabled them to declare that the said defendant, T. Rowley, was re-elected in his own place, and not to supply the place of the said W. Taylor, from the voting papers alone."

Joinder in error.

*J. Gray, for the plaintiff in error.(a) It was not necessary that
 *676] the voting papers should point out the particular vacancies which the candidates were respectively intended to fill. First, because the directions of stat. 7 W. 4, & 1 Vict. c. 78, s. 11, fulfil this purpose without any other intimation. Secondly, because, if such intimation be necessary, it may be given independently of the voting papers, and was so in the present case. As to the first point: stat. 7 W. 4, & 1 Vict. c. 78, s. 11, repeals so much of stat. 5 & 6 W. 4, c. 76, s. 47, as provides that there shall be no new election for an extraordinary vacancy unless the number of councillors remaining after such vacancy shall not exceed two thirds of the whole number of the council: it then enacts "that every election of a councillor to supply any such extraordinary vacancy, either alone or together with other councillors, which shall have been had on the 1st day of November last, shall be valid, although the number of councillors did then exceed two thirds," &c., "if in other respects such election shall have been duly had according to the provisions for the annual election of councillors contained in the said act for regulating corporations." So far the clause is retrospective. But it then proceeds: "and the councillor elected by the smallest number of votes at such election, if elected with other councillors, shall be the councillor elected to supply such extraordinary vacancy as aforesaid; and in every case in which more than one such extraordinary
 *677] vacancy shall be so supplied the councillor elected by *the smallest number of votes shall be taken to be elected in the room of him who would regularly have first gone out of office, and the councillor elected by the next smallest number of votes shall be taken to be elected in the room of him who would regularly have next gone out of office, and so with respect to the other." This part lays down a rule for the future. No other is given, though the difficulty was under the notice of the legislature. [PARKE, B. The clause speaks only of two extraordinary vacancies. The legislature does not seem to have contemplated the case of an ordinary and an extraordinary vacancy to be filled up at the same time.] An extraordinary vacancy might happen in any part of the year. [PARKE, B. The clause does not provide for the future, except where there are candidates for two extraordinary vacancies. ERSKINE, J. Probably it was known that many corporations had filled up both ordinary and extraordinary vacancies on the 1st of November: the legislature remedied such cases by this clause,

(a) The case was argued before Tindal, C. J., Maule and Erie, Js., Parke, Alderson, and Rolfe, Bs. Tindal, C. J., observed that the exception was to his own summing up: but counsel on both sides expressed their willingness that he should take part in the decision.

and may have thought that enough was done to prevent their future occurrence. MAULE, J. If the defendant Rowley's construction is right, the question for whom the respective votes are given is still decided by the voting papers themselves. ALDERSON, B. The man who had fewest votes would fill the extraordinary vacancy.] The lord chief justice's ruling seems to have proceeded on the supposition that the individual voter should show by his paper which candidate he selects for each vacancy. [ERSKINE, J. The election for supplying an extraordinary vacancy is to take place on a day to be fixed by the mayor, after notice given of the vacancy.(a) That *and the ordinary election are entirely different elections.] It is [678 contemplated that both vacancies may be filled up at the same time. Secondly, the general regulation as to voting, stat. 5 & 6 W. 4, c. 76, s. 32, does not require parties to state by their papers which candidate they vote for. The voting may be according to lists, as in *Regina v. Brightwell*, 10 A. & E. 171. A previous nomination of candidates to fill the respective vacancies makes it sufficiently certain what is intended by the votes. [ALDERSON, B. Are the electors bound by it? MAULE, J. Cannot a man be elected to fill a vacancy which he was not proposed for?] When an election takes place to fill ordinary and extraordinary vacancies at the same time, it ought to be previously understood who is to be deemed the candidate for each vacant office; otherwise the same person might have forty-eight votes given for him as candidate to fill one vacancy, and forty-eight as candidate to fill another, and yet be defeated by a competitor as to either, having only forty-nine votes in all. [MAULE, J. That may show that an election in respect of both vacancies at once is bad. Was there, in this case, any previous understanding, or circulation of lists?] The bill of exceptions has no statement as to this: but there can be no doubt that the parties knew who was the candidate in respect of each vacancy. [ROLFE, B. Why is it to be presumed that the voters consented to elect each person for the time only as to which he was a candidate? Some might have so good an opinion of an individual as to wish him elected for as long a time as possible. PARKE, B. It is not to be assumed that, even if the papers had specified times, *the proceeding would have been valid. ALDERSON, B. It [679 is much better that the elections should be separate. ROLFE, B. All that appears in the present case is, that, the votes being in fact taken at the same time in respect of all the vacancies, the lord chief justice said that the alderman and assessor could collect from the voting papers only which candidate was proposed by any voter to fill any particular vacancy. PARKE, B. There are in fact no means of parol information, except the three questions to be put under stat. 5 & 6 W. 4, c. 76, s. 34. The legislature has provided for the giving of some information by the voting papers, but not this. ALDERSON, B. If each voter had said, *vivâ voce*, I vote for A., B. or C., you could not have gained the necessary information unless you could have asked him which vacancy he desired the candidate to fill.]

(a) Stat. 5 & 6 W. 4, c. 76, s. 47, 52.

J. W. Smith, *contra*, was not heard.

Per Curiam.

Judgment affirmed.

The relator entered up judgment of affirmance, with costs of the writ of error; (a) and, on taxation, these costs were allowed him.

J. Gray, on February 1st, 1845, obtained a rule calling upon the defendant to show cause why the taxation should not be set aside, and the judgment amended by striking out the part as to costs in Error.

*680] *In Easter vacation, 1845, (b) *J. W. Smith* showed cause. It is understood to be the rule, and is laid down in *Corner's Practice of the Crown Side of the Court of Queen's Bench*, p. 107, that "the party in whose favour judgment is given in the Exchequer Chamber will be entitled to costs, if he would have been so entitled, had the original judgment been in his favour," and "an appointment may be had and the costs taxed at the crown office, to be recovered by attachment, *ca. sa.* or *fi. fa.*, as the case may be." The officers tax these costs, on error, under stat. 11 G. 4, & 1 W. 4, c. 70, s. 8. Stat. 3 H. 7, c. 10, took effect only in favour of plaintiffs or demandants against defendants or tenants. Stat. 3 Ja. 1, c. 8, makes further provision as to writs of error in certain actions: 2 stat. 13 Car. 2, c. 2, (c) by sects. 9, 10, improves the remedy and applies it to cases not within the preceding statute, and, by sect. 11, enacts that the clauses then introduced shall not apply to informations, as if the legislature supposed that, without that special provision, they would so apply. Then, by stat. 9 Ann. c. 20, sects. 4, 5, the relator and defendant on a *quo warranto* information are for the first time placed in the same situations respectively as the parties to an action, and the court is authorized to give judgment that the relator or the defendant, if successful, do recover his costs. If, therefore, in such a case, a judgment on error be affirmed, the successful party ought to have his costs, as if the proceeding were in one of the actions enumerated in the earlier statutes. The practice now *is to treat the judgment of the Court of Error in this respect as a new judgment substituted for that of the court below. (d) An action would lie on it. [TINDAL, C. J. The late act does not give costs on the judgment of this court. ALDERSON, B. Suppose the judgment here is a new judgment; how does that entitle to costs under stat. 9 Ann. c. 20? TINDAL, C. J. You

(a) The judgment below was judgment of ouster, "and that the said William Smith, the relator above mentioned, do recover against the said T. Rowley, the sum of 162*l.* 6*s.* 6*d.* for his costs by him laid out and expended in carrying on his said suit in this behalf, according to the form of the statute in such case made and provided."

(b) May 9th. Before Tindal, C. J., Coltman, Maule, and Cresswell, Js., Pollock, C. B., Parke, Alderson, and Rolfe, B.

(c) And see stat. 8 & 9 W. 3, c. 11, s. 2, in favour of defendants below.

(d) He referred to *Regina v. Humphery*, (judgment in the Exchequer Chamber, June 4th, 1839,) reported, but not as to costs, 10 A. & E. 335, where the party succeeding in Error recovered costs in the Exchequer Chamber by judgment of that court. And in *Rex v. Johnson*, (judgment in the Exchequer Chamber, June 8th, 1836,) reported, but not as to costs, 5 A. & E. 488, the Court of Exchequer Chamber (as appears by the record) awarded that the defendant should recover 543*l.* 12*s.* 9*d.* for his costs in the Queen's Bench, and 83*l.* 17*s.* for his costs of the writ of error.

fail of making out your title to costs either under the act constituting this court, or under any statute giving costs in a court of error.]

J. Gray, *contrà*, was not heard.

Per Curiam.

Rule absolute.

*IN THE EXCHEQUER CHAMBER.

[*682

(Error from the Queen's Bench.)

The QUEEN on the Prosecution of WRAY v. The Governors of the DARLINGTON Free Grammar School. *Nov. 27.*

Queen Elizabeth, by charter, founded and endowed a grammar school at D., and incorporated certain persons and their successors as governors, and granted to them, for ever, full power and authority from time to time of electing, nominating and appointing a master and usher of the said school so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, and of removing the same master or usher from the said school, according to their sound discretion, and of placing or appointing other or others more fit in their stead or steads.

Held by the Court of Queen's Bench, and by the Court of Exchequer Chamber, affirming their judgment, that, by the terms of the charter, the governors might in their discretion remove a master without summons or hearing, and although no charge against him had been exhibited to them.

The governors were empowered by the charter to make by-laws, and, in 1748, they enacted a by-law, requiring certain qualifications in the future masters, and ordaining (for the encouragement of well qualified persons to accept the office) that no master should thereafter be displaced, removed or removable from the office unless some sufficient cause of complaint should be exhibited in writing against such master, and signed by the governors or their successors, and the same cause of complaint be first allowed of and declared by them to be a sufficient cause.

Held by both courts that the governors had no right thus to limit the discretion given by the charter, and that the by-law was void.

To a mandamus requiring the governors to restore a master whom they had dismissed, and alleging that he had always behaved himself well, &c., the governors made return, stating the charter, and averring that the prosecutor did not always behave himself well, &c., and that they received complaints from parents of the scholars, namely from A. B. and C. D. of the prosecutor's misconduct and inattention, and particularly that, &c., (specifying complaints made by A. B. of particular acts of misconduct:) that the governors gave the prosecutor notice of the complaints, and called upon him to answer, which (after having reasonable time and opportunity) he failed to do; and that the governors, being satisfied of the truth of the charges, *in the exercise of their best discretion, and deeming the prosecutor an unfit person to be master*, discharged him. Prosecutor took several traverses, denying that he had committed the acts charged, or that he had reasonable time, &c. to answer. He also pleaded the above by-law, and that no sufficient cause of complaint, exhibited in writing, was, before his dismissal, allowed according to the said law. The governors joined issue on the traverses, and replied to the plea, stating acts of misconduct, notice thereof to the governors, complaint in writing exhibited by them setting forth the causes, which were sufficient for dismissal, delivery of the written complaint to prosecutor, omission by him to answer though he had reasonable time and opportunity, allowance of the charges by the governors, and dismissal thereon. Rejoinder, denying that a complaint in writing, stating sufficient cause, was delivered to prosecutor, or allowed by the governors. Issue thereon.

A verdict being found for the crown on all the issues, the Court of Queen's Bench gave judgment for the defendants non obstante veredicto.

Held by the Court of Exchequer Chamber that, under stat. 9 Ann. c. 20, s. 2, (and consequently under stat. 1 W. 4, c. 21, s. 3,) judgment non obstante veredicto may be given for the party making return to a mandamus, and that it was rightly given here.

Quære, by the Court of Exchequer Chamber, whether, in other cases than that of mandamus, judgment non obstante veredicto may be given for a defendant as well as for a plaintiff. *Seemle*, per PARKER B., that it may.

MANDAMUS directed to the governors of the Free Grammar School of Queen Elizabeth within the town or village of Darlington, in the county palatine *of Durham. The writ recited, in the usual form, that *683] George Wray, clerk, "was duly qualified for, and duly elected, nominated, appointed, licensed, allowed and admitted to and into the place and office of upper master or pedagogue of the said grammar school, created, founded and established under and by virtue of certain letters patent" of Queen Elizabeth, "for the education and instruction of youth, in which said place and office he the said G. Wray always behaved and governed himself well and according to the statutes and ordinances made for the management, ordering, direction and government of the upper master or pedagogue for the time being at such school, to wit at," &c. "Yet that you, the said governors of the said free grammar school, without any reasonable cause, and contrary to the said letters patent, statutes and ordinances, have unjustly reioved the said G. Wray from the said place and office of upper master or pedagogue of the said school, in contempt," &c. The writ then commanded the governors immediately to restore the said George Wray to the said place, &c., or show cause to the contrary.

Return. That the said school was founded by letters patent of Queen Elizabeth, (15th June, 5 Eliz.,) by which her majesty granted that from thenceforth there should be a grammar school in the village of Darlington aforesaid, which should be called the Free Grammar School of Queen Elizabeth, for the education, institution and instruction of youth in grammar, to continue for ever, and the said school constantly of one master or pedagogue, *684] and one usher or sub-pedagogue, to continue and *be she did set up, ordain, create, found and establish; and, that her intention aforesaid might be better enforced and take effect, and that the lands, revenues, and other things for the support of the said school afterwards granted, assigned and appointed might the better be governed for the establishment of the said school, she did will and ordain that the four wardens of Darlington, for the time being, should be, and be called, Governors of the said Free Grammar School and of the possessions, revenues and goods of the said school; and she appointed the then wardens to be the then present governors, and incorporated them and their successors by the name of The Governors of the Free Graminar School of Queen Elizabeth within the town of Darlington in the county palatine of Durham; and did give and grant, to them and their successors, "that they, the same governors and their successors, and the major part of them, for the time being, might have, and for ever thereafter should have, full power and authority, from time to time, of electing, nominating and appointing a master and usher of the said free school aforesaid so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, and of removing the same master or usher, or either of them, from the said school, according to their sound discretion, and of placing or appointing other or others more fit in their stead or steads, and of performing and doing

all other things which to the said free school relative to the teaching therein should be necessary and expedient." Of which letters patent, (notice to Wray before his alleged misconduct.) And the governors certified "that, although true it is that the within named G. Wray, after the making of the said letters *patent and before the coming of the within writ to them the said governors, to wit A. D. 1836, was elected," &c., [*685 "and admitted to and into the place and office of upper master or pedagogue of the within mentioned grammar school, and so continued until he was removed by us the said governors as hereinafter set forth, yet that the said G. Wray did not always behave or conduct himself well as such upper master or pedagogue of the said school as within mentioned, and that they, the said governors, after the said G. Wray was so elected, appointed and admitted upper master or pedagogue of the said school, and before his removal as hereinafter mentioned, and whilst he held the office of such upper master or pedagogue, to wit on 1st January, A. D. 1840, and on divers other days and times between that day and the time when he was so removed from the said office as hereinafter mentioned, received from divers parents of divers free scholars of the said school and inhabitants of Darlington aforesaid, namely," (mentioning one Mary Smith and other persons by name,) "divers complaints of the misconduct and inattention of the said G. Wray as such upper master or pedagogue of the said school, and particularly that the said G. W., whilst he was such master or pedagogue, on various occasions absented himself from, and neglected to attend at, the said school during the school hours, contrary to his duty," &c., "and to the prejudice of the scholars," &c. And the governors further said "that the said Mary Smith in particular on the several occasions aforesaid complained to the said governors, and charged against the said G. Wray, as such master as aforesaid, that the said G. Wray, whilst he was such master," &c., did, on, &c., under colour of his authority as such master, and *of his said office, inflict unreasonably severe corporal punishment [*686 on T. S., son of the said Mary, then being an infant scholar of the said school, contrary to the duty, &c.; and that G. Wray, while master, &c., wrongfully and under colour of his said authority, on various occasions demanded, exacted and received divers sums of money, namely 2s. and 2s. from W. S. and the said T. S. sons of the said Mary, then being respectively scholars of the said school; and that G. W., under colour of his said office, &c., wrongfully and contrary to his duty, on other occasions demanded and attempted to exact and receive divers other sums of money, to wit 9s. and 1l. 1s., from the said M. S. as parent of the said W. S. and T. S., then being respectively scholars, &c. Whereupon we the said, &c., (naming the defendants,) "then being wardens of the church of Darlington aforesaid, and governors of the said school, having afterwards, to wit, on 16th November, 1840, given notice of the same complaints and charges of the said Mary Smith to the said G. Wray, and having then called upon the said G. Wray to answer the said complaints and charges of the said M. Smith,

and the said G. Wray having had reasonable time and opportunity in that behalf, but having notwithstanding failed so to do, and we the said governors having ascertained and being satisfied of the truth of the said complaints and charges, and that the said G. Wray was guilty of the said several offences and misconduct so charged upon him as aforesaid, in the exercise of our best discretion, and deeming the said G. Wray to be an unfit and improper person to fill the said office of upper master or pedagogue of the said school, before the coming of the said writ to us, namely, on 20th

*687] November, A. D. 1840, "by an instrument in writing under our respective hands and sealed with the common seal of the governors of the said school, did, by virtue and in pursuance of the said letters patent, remove, discharge and displace the said G. Wray from the said office and place of upper master or pedagogue of the said school, as it was lawful and right for us so to do for the cause aforesaid: which is the removal of the said G. Wray in the said writ mentioned." Verification. "Wherefore we humbly pray your majesty if we ought to be compelled to restore," &c.

The prosecutor, by force of the statute, &c., (1 W. 4, c. 21, s. 3,) tendered several traverses; viz. 1. That he did not, while he was such master, absent himself, &c., in manner and form, &c. 2. That he did not inflict unreasonably severe corporal punishment on Thomas Smith, the son, &c., in manner, &c. 3. That he did not wrongfully, &c., demand, &c., from the said sons of Mary Smith, or either of them, in manner, &c. 4. That he did not under colour, &c., demand, &c., from the said Mary Smith, in manner, &c. 5. "That prior to his said removal he did not have, nor was allowed, reasonable time or opportunity to answer the said complaints and charges, or either of them." Issues were joined on the traverses respectively. He further pleaded as follows.

5. "And, for plea to the said return, and by force of the said statute, the said G. Wray says that, in and by the said letters patent of her said majesty Queen Elizabeth, her said majesty did also will, grant, enjoin and declare that the said governors and their successors, with the assent of the Earl of Westmoreland and Bishop of Durham for the time being, from time to time should *make, or cause and procure to be made, good, fit *688] and salutary statutes, decrees and orders in writing touching and concerning the management, order, government and direction of the master, usher and scholars of the free school aforesaid, and each of them, for the time being, and of the stipend and salary of the said master and usher, and touching and concerning all other matters whatsoever to the said free school, and the order, government, preservation and disposition of the rents, revenues and goods thereof appointed for the maintenance of the said school; which said statutes, decrees and orders so made her said majesty did thereby will, grant and command should be inviolably observed from time to time for ever thereafter. And afterwards, to wit on 23d February, A. D. 1748, in and by a certain instrument in writing bearing date a certain day," &c., "to wit the 3d day of February in the year last aforesaid, and signed,

sealed and duly executed by the persons hereinafter mentioned as the major part of the said governors for the time being, by whom the common and body corporate seal of the said school was duly affixed thereunto, reciting that since the granting of the said letters patent no statutes, ordinances or decrees in writing had at any time been made by the said governors of the said school, whereby the good intent of the founding thereof had in many instances been greatly obstructed, and frequent unhappy divisions and contentions had arisen about the placing and displacing of proper masters in the said school, certain persons therein named, to wit Edward Lewson, Robert Turner and Robert Robinson, being, and therein described as, the major part of the four governors of the said school for the time being, did then and thereby, *by and with the assent and consent of the right reverend," &c., "Edward then Lord Bishop of Durham, testified [*689 under his episcopal seal thereunto affixed, the title of the Earl of Westmoreland, named in the said letters patent, being at that time, that is to say at the time of the making of the said instrument, extinct, make, constitute, decree and ordain the several good and salutary statutes, constitutions, decrees and ordinances thereafter and hereinafter mentioned, of and concerning (amongst other things) the ordering, governing and direction of the upper master and under master and scholars of the said school, and every of them, to be faithfully and inviolably kept and observed by them and their successors, and all and every other person and persons having any concern in the premises from time to time for ever, according to the true intent and meaning of the said letters patent: that is to say, concerning the electing, appointing, continuing and removing of an upper master or under master of the said school, they did decree, ordain, constitute and declare as follows, that is to say: That no man should thereafter be elected or appointed upper master of the said free school except he should be of the full age of twenty-four years at the least, and a person of sound learning, sober and exemplary life and conversation, good morals, and duly qualified to teach and instruct youth in the elements of grammar and the Latin tongue, and also for the right understanding of God's true religion: And also except, before he enter into or execute the said office of upper master, he should be duly licensed and allowed by the Bishop of Durham for the time being or his ordinary, and make and subscribe the declaration, and take the oaths by law required in *this behalf." And, for the encouraging of the students of Oxford and Cambridge, and promoting of sound learning in the school, [*690 they decreed and ordained that a due preference and regard should be given to any graduate student in either of the said universities who should thereafter offer himself a candidate for the place of upper master whenever it should be declared vacant, provided he should produce proper and satisfactory testimonials of his morals and abilities from the college or society to which he does or did belong. "And, for the further encouragement and inducing of such graduates, or other persons of known abilities and sound learning in the Latin tongue, to accept of and undertake the duty and office

of upper master of the said free grammar school, they did thereby decree ordain, constitute and declare that no upper master elected or appointed, or to be elected or appointed, and duly licensed and approved of in manner aforesaid, and who should be in the actual possession and exercise of the said office of upper master of the said free school, should at any time or times thereafter be displaced, removed or removable by them or their successors from the said office of upper master of the said free school, unless some good and sufficient cause of complaint or misbehaviour should be exhibited in writing against such upper master, and signed by them or their successors, and the same cause of complaint be first allowed of and declared by them or their successors for the time being to be a sufficient cause to displace or remove such upper master, and not otherwise." Averment, that, although the said statutes, decrees and ordinances thereby became, and were at the time of G. Wray's removal, and are, in full force and effect, and although he had *been and was duly qualified, elected, ap-
 *691] pointed, licensed and approved of in manner in the said decrees, &c., mentioned and required in that behalf, and, before and at the time of such removal, had been and was in the actual possession and exercise of the said office, "yet no good and sufficient cause of complaint or misbehaviour being the same cause of complaint exhibited in writing against the said G. Wray as such upper master, and signed by the governors of the said school for the time being, that is to say, the said persons making the said return, was first, that is to say before the removal and displacing of the said G. Wray as aforesaid, allowed of and declared by them to be a sufficient cause to displace or remove the said G. Wray from his said office, according to the true tenor and effect of the said statutes, decrees and orders." Verification, and prayer of judgment and a peremptory writ.

Replication, (protesting that the plea is insufficient in law.) That, before the said removal and displacing of G. Wray, and whilst he was such master, &c., to wit on, &c., he the said G. Wray, under colour of his said office and his authority as such master, did inflict improper and unreasonably severe corporal punishment in and upon one Thomas Smith the younger, then being an infant scholar of and at the said school at Darlington aforesaid, contrary to the duty of the said G. Wray as such master, and contrary to the rules and regulations then in force for the government, management and direction of the said school and the master thereof. And that, before the removal, &c., and whilst he was such master, &c., to wit on, &c., he the said G. Wray, under colour, &c., (as before,) wrongfully and unlawfully demanded and attempted wrongfully to exact and receive from one Mary
 *692] *Smith, then being the wife of Thomas Smith the elder, and mother of the said Thomas Smith the younger, who was then a scholar of and at the said school, a certain sum of money, to wit one guinea, contrary to the duty, &c., and contrary to the rules, &c. And the said governors further say that they the said governors, having then had notice of the premises, and complaint thereof having been made to them by the said Mary

Smith, afterwards, and before the said removal," &c., to wit on, &c., "exhibited a complaint in writing, signed by the said governors respectively, of and concerning and setting forth the said several causes of complaint against the said G. Wray in this plea above mentioned, and then caused the same complaint in writing, so signed as aforesaid, to be delivered to the said G. Wray; which causes of complaint were, and each of them was, good and sufficient cause for removing and displacing the said G. Wray from his said office of master of the said school. And the said governors further say that, the said G. Wray having failed to answer or defend himself against the said complaint and charges, although he had reasonable time and opportunity so to do, they the said governors afterwards, and before the said removal," &c., "to wit on," &c., "did allow of and declare the said several causes of complaint hereinbefore mentioned, and each of them, to be sufficient cause to displace and remove the said G. Wray from his said office of master of the said school, and did thereupon afterwards, to wit on," &c., "remove and displace the said G. Wray from his said office, in manner and form as in the said return of the said governors to the said writ of mandamus is alleged, and as it was lawful and right for them to do for the cause aforesaid. Verification, and *prayer of judgment if a peremptory mandamus ought to be awarded. [*693

Rejoinder. That no complaint in writing, signed by the said governors respectively, and setting forth good and sufficient cause or causes of complaint, as in the said replication mentioned, was delivered to him the said G. Wray; and that the said governors did not, before the said removal, allow of and declare the same complaint or causes of complaint or either of them, so signed and exhibited as aforesaid, to be sufficient cause to displace and remove him the said G. Wray, in manner and form,' &c. Conclusion to the country. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the Durham Summer assizes, 1842, a verdict was found for the crown on all the issues.

In Michaelmas term, 1842, *Wortley* obtained a rule nisi for arresting the judgment, or for entering a verdict for the defendants non obstante verdicto.(a)

In Hilary term, 1843,(b) *Dundas*, *Hayward*, and *Pashley* showed cause; and *Wortley* and *Joseph Addison* supported the rule. It is considered sufficient to refer to the judgment, and to the arguments and judgment in the Court of Error. Besides several authorities, afterwards cited in the Court of Error, and mentioned in the report of the argument there, the following were referred to. *Thomas v. Howel*, 4 Mod. 67; *Peyton v. Bury*, 2 P. W. 626, 627; *Aislaby v. Rice*, 8 Taunt. 459; *Earl Mountague v. Earl of Bath*, 3 Ca. Ch. 55; *Rex v. Hughes*, 3 A. & E. 425; *The Case of Sutton's *Hospital*, 10 Rep. 23 a, 31 a, 34 a; *Hicks v.* [*694

(a) He moved also for a new trial, on the ground of misdirection, but the court refused a rule. It is not thought necessary to report the case as to this point.

(b) Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Ja.

Lanceston, 6 Vin. Abr. 266, *Corporations*, (G) pl. 5, &c. ; Com. Dig. *Condition*, (D 1,) (D 7,) (L 1) ; *Moggridge v. Thackwell*, 7 Ves. 36, 69 ; *Rutter v. Chapman*, 8 M. & W. 1 ; *Robinson v. Hardcastle*, 2 T. R. 241, 254, 781 ; *Pomery v. Partington*, 3 T. R. 665 ; *Winter v. Lovedaz*, Carth. 427, 429 ; *Rex v. Morris*, 4 East, 17 ; *Rex v. Bellringer*, 4 T. R. 710 ; *Rex v. Miller*, 6 T. R. 268 ; *Blacket v. Blizard*, 9 B. & C. 851 ; *Regina v. The Justices of Cambridgeshire*, 7 A. & E. 480 ; *Rex v. Grimes*, 5 Burr. 2598 ; LITTLEDALE, J., in *Lucas v. Nockells*, 10 Bing. 157, 186. *Cur. adv. vult.*

LORD DENMAN, C. J., in Hilary vacation, 1843, (February 8th,) delivered the judgment of the court.

This was a mandamus to the governors of Darlington school, to restore a schoolmaster. The return set forth a charter of Queen Elizabeth, by which the charity was founded, and which conferred on the governors full power to appoint the schoolmaster, and to remove him, and appoint another, according to their sound discretion ; the power of appointing being in general terms, and the appointment not purporting to give an office of freehold. It then stated that the prosecutor had been guilty of several acts of misconduct, specified in the return ; that the governors gave him an opportunity of disproving the charges, which he had failed to do ; and that the governors, in the exercise of their best discretion, being convinced of the truth *of the charges, and deeming him an unfit and improper person to be master, had removed him from his office.

The pleas denied all the specific facts : and, issue being joined upon them, they have all been negatived by the jury. But another plea set forth a by-law, made in the year 1748, declaring certain qualifications to be requisite for a master, and prescribing a certain process for removing any, giving the master a fair opportunity of being heard in his defence, whenever he may be accused with a view to his removal, with an averment that such process had not been followed nor such opportunity given to the prosecutor. Issue having been taken on this plea, a verdict was found on this also for the prosecutor.

But the defendants have moved for judgment notwithstanding the verdict on these points, arguing that the by-law is invalid in law, because inconsistent with the trust and power vested in the governors by the letters patent. (His lordship then read the passage in the letters patent ; ante, p. 684.)

We are clearly of opinion that this objection is fatal to the validity of the by-law. We are far from saying that persons in authority ought not to give the fullest opportunity of defence to any of those employed under them, whom they may be disposed to remove on complaint preferred by others against them for misconduct. But they accept a larger trust, and impose on themselves a wider duty, when they undertake to govern the school in the manner required by this charter. They are bound to remove any master whom, according to their sound discretion, they think unfit and improper for the office : and, as that discretion may possibly be well exercised for defects of various kinds not amounting *to misconduct, so there may be misconduct, incapable of proof by witnesses, but fully known

to the governors themselves, on which they could not abstain from exercising their power of removing the master without the abandonment of their duty.

Holding the by-law invalid for this general reason, we need not consider the other objection urged against it, the want of sanction by an Earl of Westmoreland, no person with that title having been in existence at the time it was ordained.

But the question does not end here. The defendants have returned, not only the matters which, if proved, would bring the master within the operation of the by-law, but, further, that they, being fully satisfied of the truth of the charges, removed him, deeming him an unfit person, in the exercise of their best discretion. And it was contended that, as the due conviction for offences specified had been put forward by the governors as their reason for dismissing the prosecutor, and as that reason failed, their act of dismissal remained without justification. But they might be reasonably satisfied of the truth of the charges, without possessing any means of proving them by evidence: and, even if they had no charge before them, they might still, in the exercise of their discretion, remove him for reasonable cause. The prosecutor has denied the charges and the trial; but he does not deny the exercise of discretion, which might have been disproved in fact, as by showing that malicious feelings against the master were indulged by the governors, or that they had some interest to serve in promoting another to his place.

The allegation of removal in the exercise of discretion is an independent allegation, which the prosecutor does not deny, though it is accompanied with reasons *which, on the trial, he disproved. But the power of the governors so to remove justifies their so doing; and it is not to [*637 be restricted by any opinion which we may form of the reasons on which they have been induced to exert it.

The return is therefore good: and the defendants are entitled to our judgment. They will, however, have to pay the costs of the issues found in favour of the prosecutor.

Judgment for the defendants.

The judgment entered up was that: "because it appears to the court here that the plea of the said G. Wray by him lastly pleaded to the aforesaid return of the governors," &c., "to the said writ of mandamus, and the matters therein contained, are bad and insufficient in law to entitle the said G. Wray to a peremptory writ of mandamus in this behalf; therefore it is considered," &c., "that, notwithstanding the verdict found for the said G. Wray on the several issues above joined as aforesaid, yet that no peremptory writ of mandamus do issue in this behalf; and the governors of the said free grammar school do depart hence without day in this behalf; and that the said governors do recover against the said G. Wray the sum of 138*l.* 10*s.* 9*d.* for their costs and charges by them laid out and expended in this behalf."

The prosecutor brought error in the Exchequer Chamber, assigning error in the common form. Joinder.

The case was argued in the vacation after last Trinity term, and in the present vacation. (a)

*Pashley for the plaintiff in error. The plaintiff is entitled to judgment here, if the court below might legally have given judgment for him on the last traverse, which alleges that Wray, before his removal, had not reasonable time or opportunity to answer the charges. The principle is laid down in *Bagg's Case*, 11 Rep. 93 b, 99 a, that although there be lawful authority and just cause to remove a party charged with misconduct, yet if such proceeding was taken without hearing him answer to what was objected, or without reasonable warning, such removal is void and shall not bind, being against justice and right. The same principle was insisted upon in *Rex v. Gaskin*, 8 T. R. 209, where, to a mandamus requiring the defendant to restore a parish clerk, the return stated dismissal for bad conduct, but did not allege that the party had been summoned to answer; and Lord KENYON said, "if we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice, *audi alteram partem*." The rule is also recognised in *Rex v. Ford*, 12 Mod. 453; *Rex v. Simpson*, 1 Stra. 44; *Rex v. Benn*, 6 T. R. 198; and *Harper v. Carr*, 7 T. R. 270. [PARKE, B. All those cases refer to removal, or some penal proceeding, for cause, not to a discretionary removal. Is a man obliged to call upon his servant to answer charges, before he can dismiss him?] In *Capel v. Child*, 2 Cro. & J. 558, S. C. 2 Tyr. 689, the Bishop of London had, under stat. 57 G. 3, c. 99, s. 50, appointed a curate to perform the duties of a parish church, those duties having, as was alleged, been imperfectly performed by reason of the incumbent's negligence, *and he not having, on monition, nominated a curate; and, *699] although the statute empowered the bishop to send out such monition if the defect by reason of negligence appeared to him "either of his own knowledge, or upon proof by affidavit," the Court of Exchequer held the monition irregular, on general principles of justice, because the incumbent had not been summoned to answer. This court, in *Rex v. Wilson*, 3 A. & E. 817, 826, adopted the language used in 2 Hawk. P. C. 49, Book I. c. 64, s. 60, 7th ed.: "It is implied by natural justice, in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself." These considerations acquire more force from the nature of the present office. The mandamus does not state it to be of freehold: but it is of uncertain duration, and may be for life. The charter gives to the four wardens the power of appointing a master and usher, "and of removing the same master or usher" "from the said school, according to their sound discretion, and of placing or appointing other or others more fit." That makes the tenure of the office very different from a holding *durante bene placito*. Lord COKE says that, if a

(a) June 24th, before Tindal, C. J., Coltman and Erskine, Ja., Parke, Gurney and Rolfe, Ba. And November 26th, before Tindal, C. J., Maule and Erie, Ja., and Parke, Alderson, and Rolfe, Ba.

man grant to another an estate for "as long as the grantee dwell in such a house," "or until the grantee be promoted to a benefice, or for any like uncertain time, which time, as Bracton saith, is tempus indeterminatum: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the "deed:" Co. Litt. 42 a. The office now in question is of this indeterminate tenure, and differs from [*700 one held merely at will and pleasure as in *Dighton's Case*, cited on the argument below, 1 Ventr. 77, 82, S. C. 1 Sid. 461; Sir T. Ray, 188. An office may, by express terms of a grant, be made subject to removal ad libitum; "but generally, an officer shall not be removed without cause:" Com. Dig. *Franchises* (F 32.) Here the master is, under the terms of the charter, removable by the governors only "according to their sound discretion." [MAULE, J. What difference is there between "discretion" and "sound discretion?" PARKE, B. The only question is whether, if they think fit to remove the master, they may not do so. TINDAL, C. J. If you could put this on the footing of a freehold office, it would be different.] Bracton, f. 207 a, lib. 4, c. 28, states a holding "ut liberum tenementum" to be "sicut ad vitam tantum vel eodem modo ad tempus indeterminatum, absque aliquâ certâ temporis præfinitione, s. donec quid fiat vel non fiat:" but, he says, "liberum non potest dici tenementum alicujus, quod quis tenet ad voluntatem dominorum præcario, quod tempestivè et intempestivè poterit revocari." [TINDAL, C. J. You are giving the case of land; where there is a livery.] A power to remove according to a sound discretion is, at any rate, not equivalent to a mere arbitrary power. Where parties are authorized "to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law;" *Rooke's Case*, 5 Rep. 99 b, 100 a; and "discretion" is defined according to this rule in *Callis on Sewers*, 112. [TINDAL, C. J. "Discretio est discernere per legem quid sit iustum:" 4 Inst. *41.] The dicta of Lord COKE on this subject in 4 Inst. and *Rooke's Case*, are adopted by Lord MANSFIELD and WILMOT, [*701 J., in *Rez v. Peters*, 1 Burr. 568, 570. [PARKE, B. If the founder had intended to give an absolute power, could stronger words have been used than in this charter? TINDAL, C. J. What difference is there between power to remove at discretion, and at will?] Natural justice makes a distinction. [PARKE, B. That cannot enter into consideration if there is a power to be exercised at will. ALDERSON, B. The governors might have found a much fitter man. Suppose they had returned that. Must a jury have been called upon to say which was, for instance, the best scholar?] If the governors had simply returned that, in the exercise of a sound discretion, they had removed the master, that exercise of discretion might have been conclusive. Still it ought to appear that the party was called upon to answer. [PARKE, B. Why so? Suppose they thought him

a heavy, stupid man; would there have been any advantage in hearing him?] That argument is, at any rate, not open in the present case, because the defendants return that Wray, "having had reasonable time and opportunity" to answer, "but having notwithstanding failed so to do, and we the said governors having ascertained and being satisfied of the truth of the said complaints and charges, and that the said G. Wray was guilty of the said several offences and misconduct so charged upon him as aforesaid, in the exercise of our best discretion, and deeming the said G. Wray to be an unfit and improper person to fill the said office," discharged him. It may be observed that the exercise of discretion here is not on a mere ques-

*702] tion of fitness, but on that of Guilty or Not guilty. [TINDAL,

C. J. If they had returned merely that in the exercise of a sound discretion they removed him, would not that have been a good return? and does not the maxim "utile per inutile non vitiatur" apply?] Having stated an adjudication, grounded on certain reasons, they were bound to show that the party to be affected had an opportunity of combating those reasons, according to the principle of justice laid down in the cases before cited, and acted upon in *Painter v. Liverpool Gas Company*, 3 A. & E. 433; *Regina v. The Justices of the West Riding*, 7 A. & E. 583; *Fisher v. Lane*, 3 Wils. 297, and *Bruce v. Wait*, 1 Man. & G. 1. [ROLFE, B. Nobody disputes the principle; the question is if this case comes within it.] In *Regina v. The Bailiffs of Ipswich*, 2 Ld. Ray. 1232, 1240, on mandamus to restore a party whom the corporation had discharged from the office of recorder, "HOLT said that if he had been an officer ad libitum, the corporation ought to have returned that, and relied upon it, and it would have been a good return; but they could not take advantage of that, when they had returned a cause, if the cause were not sufficient; for it appeared, that they had not gone upon their power, and determined their will, but put him out for a misdemeanor." Lord ELLENBOROUGH uses language to a similar effect in *Rex v. The Bishop of London*, 13 East, 419, 422.(a) [COLTMAN, J. Who is to try the truth of the facts said to be the cause of dismissal?] A jury. [COLTMAN, J. If the governors have an absolute discretion, the opinion of a jury cannot bind them.] In *Regina v. Smith*, 5 Q. B. 614, although the defendant returned that *the acts by which the dismissal was just-
*703] fied took place in his own presence and hearing, this court held that he ought to have summoned the party to answer, for that the conduct seen by the defendant might have been explained by witnesses. [PARKE, B. That was the case of a parish clerk, which is quite different from this.] The dismissal of a schoolmaster for misconduct, without summons, was held irregular in *Doe dem. Earl of Thanet v. Gartham*, 1 Bing. 357. The question of discretionary rejection and amotion was discussed, and many authorities cited, in *Rex v. The Mayor and Aldermen of London*, 3 B. & Ad. 255, where the judgments of the court do not go to the length which must be contended for on the other side.

(a) See *Rex v. The Archbishop of Canterbury and The Bishop of London*, 15 East, 117.

Secondly, judgment non obstante veredicto could not be entered up in this case. If the last plea to the return was bad, a replader should have been ordered. Judgment non obstante veredicto is given for a plaintiff only, never for a defendant; and is awarded where there is a confession and a bad avoidance; *Lambert v. Taylor*, 4 B. & C. 138, 152; *Staples v. Heydon*, 2 Ld. Ray. 922, 924. In *Tryon v. Carter*, 2 Sira. 994, where the plaintiff had replied to an immaterial plea, and the issue was found for him, the court ordered a replader: and that case was recognised as authority in *Rez v. Philips*, 1 Burr. 292, 302. [PARKE, B. The principle is, that, where there is an express confession but no avoidance, judgment shall be given for the opposite party. Is there any authority for saying that that does not apply to a plaintiff's as well as a defendant's pleading?] No instance appears in which it *has been so held. In *Norris v. Staps*, Hob. 210, 5th ed., an issue on Nil debet was found for the plain- [*704 tiffs, but, by reason of gross faults in the declaration, judgment was given against them "quod nihil capiant per breve:" it does not appear to have been judgment non obstante veredicto. [PARKE, B. There was no confession in that case.] In *Rand v. Vaughan*, 1 New Ca. 767, cited in 2 Archb. Pract. 1108, (7th ed.) TINDAL, C. J., thought that a defendant, after verdict against him, could not have judgment entered in his favour, non obstante. [TINDAL, C. J. I said only that the court was not aware of any instance. PARKE, B. There was no confession in that case: it occurred before *Gwynne v. Burnell*, in Dom. Proc. 6 New Ca. 453,(a) in which the law on this subject was so fully considered: and the dictum referred to was not necessary to the decision.] Fitz. Abr. Part 2, 158 a, *Repled.* pl. 17, 18, shows that, where the issue on a bad replication has been found for the plaintiff, a replader has been awarded. [PARKE, B. If the plaintiff, by a bad replication, confesses, and does not avoid, the matter pleaded, I cannot see why there should not be judgment non obstante veredicto, as well as where the defendant makes the same fault in his plea.] In Stephen on Pleading, 106, 107, (5th ed.) and other books, judgment non obstante veredicto is described as the plaintiff's remedy, and arrest of judgment the remedy of the defendant. In 2 Roll. Abr. 99, tit. *Judgment*, (D) pl. 2, an instance is given where, in debt on bond, the defendant, by his plea, acknowledged the sealing and delivery, but alleged, for an insufficient reason, that the *instrument was not his deed; an issue on that averment was found for the plaintiff; and the court held that the [*705 plaintiff could not have judgment on the verdict, but might on the confession. [PARKE, B. That is the meaning of judgment non obstante veredicto. And why may not it be for a defendant as well as for a plaintiff?] The practice appears to have been otherwise. Pleadings are set out in Co. Entr. 41 a, *Action sur le case*, pl. 33; 676 b, *Trespas*, pl. 19; in which a replader is awarded on an insufficient replication. [PARKE, B. Sup-

(a) See *Collins v. Gwynne*, 9 Bing. 544, in C. B.; *Gwynne v. Burnell*, in Exch. C., 2 New C. 7.

pose, in debt on bond, a release were pleaded, and the replication admitted the release, but alleged that it was not on parchment: it could not be necessary to award a repleader, a good defence being admitted.] In note (6), and note (h) to *Bennet v. Holbeck*, 2 Wms. Saund. 319 d, 6th ed., judgment non obstante veredicto seems to be treated as applicable only to the case of an insufficient plea. In *Bonham's Case*, 8 Rep. 107 a, 120 b, it is laid down that, "when the plaintiff replies, and by his replication it appears that he has no cause of action, there he shall never have judgment: but when the bar is insufficient in matter, or amounts (as the case is) to a confession of the point of the action, and the plaintiff replies, and shows the truth of the matter to enforce his case, and in judgment of law it is not material, yet the plaintiff shall have judgment." The consequence to the plaintiff, where a verdict is given for him, but it appears on the whole record that he has no cause of action, is stated also in *Blackamore's Case*, 8 Rep. 156 a, 163 a, to be merely that "he shall never have judgment." In *Molineux v. Molineux*, Jenk. 102, 2d Cent. pl. 99, S. C. Yelv. 169,

*706] instances are given of judgment *for the plaintiff founded on confession, notwithstanding verdict for the defendant. (a)

Thirdly, the plaintiff in error is at all events entitled to judgment on the special plea. The by-law there set forth might reasonably be made for effecting the founder's intention, and might therefore have been enacted by the governors independently of any special authority, and by the power inherent in a corporation, according to the doctrine recognised in *The Chamberlain of London's Case*, 5 Rep. 62 b. In the argument below, *Child v. Hudson's Bay Company*, 2 P. Wms. 207, was cited on this point; but LITLEDALE, J., says, in *Rex v. Westwood*, 4 B. & C. 781, 799, (b) "that was a corporation established for a particular purpose, and the by-law they made was out of the purposes for which they were incorporated, and therefore they could not make such a by-law." The decision in *Rex v. Westwood*, establishes the right of modifying institutions by means of by-laws in greater latitude than is required here. The only real innovation, material to this argument, introduced by the present law, is that the master shall not be dismissed without a complaint in writing, to be allowed of by the governors. A written complaint is more appropriate to the proceedings of a corporation than one made orally. [PARKE, B. It is not said that the complaint shall be exhibited to the schoolmaster.] No prior rights are infringed by this law. Some regulation of the power to dismiss was necessary for the good *government of the institution. The distinction *707] between by-laws introducing an undue restraint and those which merely regulate, has been often pointed out in cases where trades were affected, as *Green v. Mayor of Durham*, 1 Burr. 127, 131; and it applies

(a) This point was not argued on the other side; but Wortley referred to *Dice v. Manningham*, Plowd. 60, 66, and *Tilly and Wody's Case*, Yearb. Hil. 7 Ed. 4, f. 31 A. pl. 18, there cited.

(b) See *Rex v. Westwood*, 7 Bing. 1, judgment of K. B. affirmed on error.

to the regulation of other rights, as appears from Com. Dig. *By-law*, (B 2.) But, further, if the special authority was necessary in this case, it has been well pursued. The by-law is, according to the terms of the charter, a good and salutary statute; and the directions of the charter have been sufficiently complied with in making it. It was made by the major part of the governors: and a majority may bind the whole of a public body; *Rex v. The Justices of Warwickshire*, 6 A. & E. 873; and *Wilkinson v. Malin*, 2 Cro. & J. 636, S. C. 2 Tyr. 544, shows that this is an institution of a public character. [PARKE, B. All must be summoned to attend.] That being done, the majority might act for all. *Grindley v. Barker*, 1 B. & P. 229, and *Cortis v. The Kent Waterworks Company*, 7 B. & C. 314, also support this proposition. It is true that the charter gives the power of making by-laws "with the assent of the Earl of Westmoreland and Bishop of Durham for the time being," and here the bishop only assented. But the earl's title had become extinct; and, "where a condition of a bond," &c., "is possible at the time of the making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c., there the obligation, &c., is saved:" Co. Litt. 206 a; Com. Dig. *Condition* (D 1), (D 7.) [PARKE, B. This is a condition precedent, which makes a difference. But, if the power was defunct *by the death of one party who should have assented, probably the common law authority revives.] If it has become [*708 impossible to execute the power given to a corporation by charter, and the thing to be done is incident to the being of such corporation, it may be done under their common law authority; an instance is given in 1 Roll. Abr. 513, *Corporations*, (G) pl. 5. [PARKE, B. The material question here is, whether the by-law was an improper limitation of the charter authority, or a carrying of it out.] Looking to the nature of this appointment, the directions given as to the kind of person who shall be appointed, and all the other circumstances, the law appears reasonable. It allows the governors, not an arbitrary exercise of discretion, but one which may be explained in writing. Even supposing that, notwithstanding the extinction of the earl's title, the power under the charter still survived, the case is within the authorities which lay it down that, where a condition cannot be pursued literally, a fulfilment as near the intent as may be, if it substantially accomplish the intent, shall suffice: Litt. sect. 352, *Attorney General v. Whitchurch*, 3 Ves. 141; *Attorney General v. Boulbee*, 2 Ves. Jun. 380, 387, 8. The cases on this subject are reviewed in *Cherry v. Mott*, 1 Mylne & C. 123.

As to the consequences, where two persons are nominated to execute a trust, and the nomination fails as to one, *Pashley* cited *Edwards v. The Bishop of Exeter*, 5 New Ca. 652.

Wortley, contra. First: all the traverses are immaterial. The facts denied by the first four traverses are not directly alleged in the return as having been committed, *but are recited merely as subjects of the complaint made to the governors. It is directly averred that Wray did not [*709

always behave or conduct himself well as master; but the misconduct is not alleged to have been "in that" he absented himself, or did the other acts complained of; and no issue is taken on the general averment in the return that he did not always behave himself well. Nor does Mr. Wray traverse the allegation that complaint was made as stated in the return. The ground of dismissal shown by the return is, substantially, that the governors dismissed Wray in the exercise of their best discretion, and believing him an improper person to be master. If he meant to allege that the dismissal really originated in mere caprice, he might have traversed the exercise of sound discretion. Had the matters here traversed been returned before the extension of stat. 9 Ann. c. 20, s. 2, by stat. 1 W. 4, c. 21, s. 3, an action would not have lain for falsely returning them; and the former statute, s. 2, only enables the prosecutor of the mandamus "to plead to, or traverse all or any the material facts;" it does not let in any answer to the return which would not have availed before. The effect of the statute in this respect is pointed out in *Rex v. The Mayor and Aldermen of London*, 3 B. & Ad. 255, 279-281. Here the discretion of the governors, if reasonably exercised, is absolute: the very fact of complaint, or of a suspicion existing, might warrant them in dismissing the master. Indeed the words of the charter cited in the return seem to authorize a dismissal even if another master be found more fit than the person officiating. It is, however, contended on the other side that, even where the *power to remove

[710] is discretionary, the person to be removed must have notice, and the option of being heard in defence. The words of the charter seem large enough to exclude this necessity: but it is argued that, notwithstanding such general words, there must be a cause of dismissal shown, and an opportunity of discussion given. Com. Dig. *Franchises*, (F 32,) which was cited to this point, does not bear out the proposition. Dyer 332 b, in marg. is there referred to as showing that "generally, an officer shall not be removed without cause. Though the charter says, generally, that he may be removed." But in *Tompson v. Edmonds*, 3 Dy. 332 b, note (28), which seems to be the case relied upon, the ground of decision was that the party removed was an officer of the king. Where a power simply discretionary is given, it must be fairly exercised; but no cause need be shown; and therefore it is useless to summon the party; for those who exercise the discretion might allege that they had so done, and would not be bound to state the accusation. Wherever it has been held necessary to show a cause, the office has been freehold; *Bagg's Case*, 11 Rep. 93 b, (see 98 b,) (where this ground is expressly taken,) and *Rex v. Gaskin*, 8 T. R. 209, are instances. In *Regina v. The Bailiffs of Ipswich*, 2 Ld. Ray. 1232, where the party displaced was recorder, and, on mandamus to restore, it was argued for the corporation that he was an officer ad libitum, but this was not stated in their return, HOLT, C. J., said that, "if he had been an officer ad libitum, the corporation ought to have returned that, and relied upon it, and it would have been a good return; but they could not take

advantage of that, when they had returned a cause, *if the cause were not sufficient; for it appeared, that they had not gone upon [711 their power, and determined their will, but put him out for a misdemeanor." In *Rex v. The Mayor of Oxford*, 2 Salk. 428, where the question arose, (as to a town clerk,) "whether a person that was only tenant at will should have a peremptory mandamus," the court said: "We do not determine whether there ought to be a good cause, or not, for such removal; but suppose it may be without cause, yet still they must determine their will: Now they do not return a determination of his office by their will, as the reason why they do not admit him, but the special matter of his not taking the oaths; therefore, since his office continues, and this excuse is insufficient, he ought to be restored." To say that, where a discretion is exercised, the grounds must be stated and discussed, is in effect transferring the discretion from those in whom the charter vests it to this court. In *Rex v. Mayor of Stratford upon Avon*, 1 Lev. 291, S. C., as *Dighton's Case*, 1 Ventr. 77, cited p. 700, ante, a mandamus issued to restore a town clerk; the corporation returned that by charter they might choose a town clerk *durante beneplacito*, and that they had removed him; for which they assigned no cause, nor summons to answer; and the court held this return good, saying "it is to no purpose to summon him to answer, whom they may remove without a crime." *Rex v. Andover*, 1 Ld. Ray. 710, is to the same point: and the principle of those decisions is upheld in *Rex v. The Bishop of London*, 13 East, 419, 422,(a) and *Rex v. The *Bishop of Gloucester*, 2 B. & Ad. 158. If the judgment were exercised partially, or [712 proceeded upon a cause manifestly and on the face of the transaction absurd, that would be no exercise of discretion at all. The argument for Mr. Wray, if applicable to this case, would extend to the dismissal of a servant: but it has been held in such cases that, if there was cause of discharge known to the master at the time, the proceeding is justified, though the cause relied upon was not then alleged, but a different one was: *Ridgway v. The Hungerford Market Company*, 3 A. & E. 171; *Baillie v. Kell*, 4 New Ca. 638; *Cussons v. Skinner*, 11 M. & W. 161.(b) The schoolmaster here is in the situation of a servant; the foundation is primarily for the benefit of the children, not for his.

(*Wortley* was heard thus far on June 24th; and the court then adjourned. On November 26th, the court being partly composed of judges who were not present on the former day, *Pashley* was desired to restate the leading points of his argument, which he did; and the court said they would take time to consider whether they should hear *Wortley* farther. *Pashley*, on this occasion, added the following arguments in reply(c) to those of *Wortley*.)

(a) See *Rex v. The Archbishop of Canterbury and The Bishop of London*, 15 East, 117.

(b) See *Mercer v. Whall*, 5 Q. B. 417.

(c) He also added some observations not strictly in reply, which have been incorporated with the preceding argument.

It was not necessary to traverse the allegation that Wray did not always behave or conduct himself well as master: nor could it have been properly traversed, for it was too indefinite to call for an answer, no specific facts being stated; *J. Anson v. Stuart*, 1 T. R. 748; *Nauman v. Bailey*, 2 Chitt. Rep. 665; *Hickinbotham v. Leach*, 10 M. & W. 361. It is argued on the other side that the return, alleging a dismissal by the governors "in the exercise of" their "best discretion," they "deeming the said G. Wray to be an unfit and improper person," &c., is sufficient, the exercise of a sound discretion not being traversed. But this argument is not borne out by the charter. The words are different from those in *Re v. The Mayor of Oxford*, 2 Salk. 428, where the town clerk was to hold "at the will" of the mayor and aldermen; in *Re v. The Mayor of Stratford upon Avon*, 1 Lev. 291, where the town clerk was to be chosen *durante beneplacito*; and in *Re v. Andover*, 1 Ld. Ray. 710, where the charter authorized the corporation to remove common councilmen "*per discretionem suas toties quoties et quandoque illis placuerit.*" In *Regina v. The Bishop of Gloucester*, 2 B. & Ad. 158, the decision was that the court would not call upon the bishop by mandamus to exercise his discretion in a particular way; and that was sufficient for the determination of the case. The dictum in Com. Dig. *Franchises*, (F 32,) that "an officer shall not be removed without cause," is not stated there as depending on *Tompson v. Edmonds*, 3 Dyer, 332 b, note (28,) referred to in the next line; though the reason given in that case, that the party was an officer of the king, may extend to the case where an officer emanates from the king's charter. The defendants, in their return, treat the place of schoolmaster as an office which, according to Lord ELLENBOROUGH in *Re v. Merham*, 7 East, 167, 171, "must be derived either immediately or mediately from the crown," unless constituted by statute. [PARKE, B. This cannot make the place of schoolmaster here equivalent to a freehold office; it is no matter what they call him.] *Ridgway v. The Hungerford Market Company*, 3 A. & E. 171, and the other cases cited as to dismissal of servants, show that a master may discharge his servant if he has a good cause, though he did not state it to the servant or really act upon it, but not that he may assign one cause in pleading and rely upon another. The material words in *Tilly and Wody's Case*, Yearb. Hil. 7 ed. 4, f. 31 A. pl. 18, are that the plaintiff "shall not have judgment;" which goes no farther than the language of *Bonham's Case*, 8 Rep. 120 b, and means only that, under the circumstances pointed out, judgment shall be arrested.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

The first and principal ground of objection taken by the plaintiff in error against the validity of the judgment given by the court below is this: that the return to the writ of mandamus, when taken in connection with the finding of the jury, set out upon the record, furnishes no legal ground for the removal of the plaintiff from his office of schoolmaster, and that, conse-

quently, the judgment of the court below ought to have been given for the crown. The plaintiff in error contends that, upon the proper construction of the letters patent of Elizabeth, the schoolmaster is appointed during good behaviour at least, so that he had in contemplation of law a freehold in his office, and that, upon the authority of *Bagg's Case*, 11 Rep. 93 b, *Dr. Gaskin's Case*, 8 T. R. 209, and others cited, the plaintiff could [*715] not be legally removed without being summoned to answer the charge, nor, without having a reasonable time to answer, nor, lastly, without proof of the charges brought against him: all which steps are found by the jury not to have existed in this case.

And, if this is the true construction of the charter of foundation, if the office of the schoolmaster resembled that of a freeman of a borough, which was *Bagg's Case*, who according to the report of Lord Coke, 11 Rep. 98 b, had "a freehold in his freedom for his life, and with others, in their politic capacity," "an inheritance in the lands of the said corporation," or if the office of schoolmaster resembled that of a parish clerk which was the subject of discussion in *Dr. Gaskin's Case*, the inference drawn from those cases might be correct. But, looking to the terms of the letters patent of Queen Elizabeth, we think the office in question is, in its original creation, determinable at the sound discretion of the governors whenever such discretion is expressed, and that it is in all its legal qualities and consequences not a freehold but an office ad libitum only. The governors would be guilty of misconduct, might perhaps render themselves liable to a criminal prosecution, if they exercised their discretion of removal in an oppressive manner, or from any corrupt or indirect motive: but we see nothing that is to restrain them from exercising such discretionary power whenever they honestly think it proper so to do. The letters patent, after incorporating the governors, expressly give them the power of nominating, from time to time, a "master of the said school" "so often as to them and their successors, or the major part of them, occasion them moving thereto, should [*716] appear, and of removing the same master," &c. "from the said school, according to their sound discretion, and of placing or appointing other or others more fit in their stead or steads." The founder had an undoubted right to repose this large confidence in the governors, if she thought proper: and she appears to have intended so to do without subjecting the exercise of this discretion either to the judgment of any visitor or of any jury; and, if the master was appointed ad libitum, as we think he was, it is clear he was removable without any summons or hearing of him; *Re v. Mayor of Stratford on Avon*, 1 Lev. 291. And there seems nothing unreasonable in the founder's giving such authority to the governors. For there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual proof. A general want of reputation in the neighbourhood, the very suspicion that he has been guilty of the offences stated against him in the return, the common belief of the truth of such charges amongst the

neighbours, might ruin the well-being of the school if the master was continued in it, although the charge itself might be untrue, and at all events the proof of the facts themselves insufficient before a jury. Many other grounds of removal fully sufficient in the exercise of a sound discretion might be suggested.

Such, therefore, appearing to us to be the meaning of the letters patent, and there being an express allegation *in the return that the governors
*717] did, in the exercise of their best discretion, and deeming the plaintiff to be an unfit and improper person to fill the said office of master, remove and displace him therefrom, which allegation is not traversed or denied in the plea, we think the several issues raised were altogether upon immaterial points, and that, notwithstanding the finding of the jury on those issues, the return is virtually and substantially a good return.

It was in the second place argued by the plaintiff in error that, however the case might have stood upon the original letters patent, yet, as the governors had in fact found a by-law regulating the mode of appointment to the office of master of the grammar school and of the displacing of him from that office, and as the jury had found that the requisites prescribed by such by-law to be observed before the master could be displaced had not been complied with in this instance, therefore, at all events, the plaintiff was entitled to his peremptory mandamus. But we think the governors for the time being had no authority under the letters patent to make such by-law so as to bind their successors in the execution of their duty: nothing can be better established than that a by-law by a corporation, which alters the constitution of the corporation, is void; and upon the same principle a by-law which restrains and limits the powers originally given to the governors by the founder himself we think must be bad. Here the governors had the power given to them by the founder of removing the master from the said school according to their sound discretion, and of placing and appointing another more fit in his stead. And we think this power is manifestly impaired and diminished in a degree that may be materially detrimental

*718] *to its exercise for the interests of the school, by introducing, two centuries afterwards, the necessity of exhibiting a complaint in writing against the master signed by the governors, and the further necessity that the same cause of complaint should be first allowed of and declared by the governors a sufficient cause for displacing the said master. And we therefore think the second ground of objection taken, namely, that, by reason of the requisites of the by-law having not been complied with, the return to the mandamus must be held a bad return, altogether fails.

The last ground of objection is that the judgment of the court below is bad in law, inasmuch as it is a judgment for the defendants non obstante veredicto, which, it is contended, is not good in law in favour of a defendant. In order to ascertain the validity of that objection, we must look at the statute of 9 Ann. c. 20, s. 2, which is made to apply to the present case by stat. 1 W. 4, c. 21, s. 3. For the proceedings upon a mandamus

are first given by the statute of Anne, and are the creature of that act. The second section of that statute provides, first, for the case of the person suing such writ, and, next, for the case of the person making the return. It authorizes the person suing the writ to plead to, or traverse, all or any of the *material* facts contained within the return. It further provides that, in case a verdict shall be found for the person suing such writ, or judgment given for him on a demurrer, or by nil dicit, or for want of a replication or other pleading, he shall recover his damages and costs in such manner as he might have done in an action on the case for a false return, and a peremptory writ of mandamus shall be granted without delay for him for whom judgment has been given, as might have been done [*719 if such return had been adjudged insufficient. The clause next provides for the person making the return, and enacts that, in case judgment shall be given for him, he shall recover his costs of suit. The statute, therefore, evidently contemplates that judgment must be given for the one or the other. Now, in the present case, we have already expressed our opinion that the plaintiff has taken his issues, not upon the material facts contained within the return, but upon facts that are altogether immaterial; and by reason thereof we think he is not entitled to judgment upon a verdict found for him on such issues, nor to a peremptory writ of mandamus, which is the consequence of such judgment. And, the person suing the writ not being entitled to the judgment, and the return to the writ being sufficient by reason of its containing the material allegation before adverted to, which is not denied, we think the latter part of the second section of the act applies to this case, and that the persons making such return are entitled to judgment and to recover their costs of suit. And for this reason it becomes unnecessary to consider the question, whether in ordinary actions the defendant is entitled to a judgment in his favour non obstante veredicto.

We agree, therefore, with the Court of Queen's Bench, that the defendants are entitled to the judgment and costs under the circumstances disclosed on this record, and that the judgment given by that court must be affirmed.

Judgment affirmed.

END OF MICHAELMAS VACATION.

CASES

ARGUED AND DETERMINED.

IN

THE QUEEN'S BENCH,

IN

Hilary Term and Vacation,

VIII. VICTORIA.

The judges who usually sat in banc in this term and vacation were,

Lord DENMAN, C. J.

COLERIDGE, J.

PATTON, J.

WIGHTMAN, J.

MEMORANDUM.

Mr. BAXON GURNEY, in this term, resigned his seat in the Court of Exchequer: and *Thomas Joshua Platt*, of the Inner Temple, Esquire, one of her majesty's counsel, was thereupon appointed a Baron of that court, having first been called to the degree of serjeant at law, when he gave rings with the motto *Labor et Fides*. He afterwards received the honour of knighthood.

*721]

*Ex parte THOMPSON. Jan. 13.

Where a rule for a mandamus to compel a corporation to make an order has been discharged, on the ground that no demand and refusal have taken place, the court will not grant a new rule for a mandamus to the same effect, though a demand and refusal have taken place since the discharge of the former rule.

A. J. STEPHENS moved for a rule calling on the mayor, aldermen, and burgesses of the borough of Stamford to show cause why a mandamus should not issue, commanding them to cause the treasurer of the borough to render an account of the sum of 117*l.* 19*s.* 3*d.*, received by him as such treasurer, and to pay the said sum into the borough fund, or to such person as the council should authorize to receive the same. He stated that, in last Easter term, a rule nisi had been obtained to the same effect, which had

en discharged in last Michaelmas term, without costs, on the ground that it did not appear that there had been a demand and refusal; but he added that, since the discharge of the rule, a demand had been made which had been virtually refused. [Lord DENMAN, C. J. Then you are making an application which has already been refused, on fresh materials.] A fresh right has accrued which did not exist when the former rule was discharged, and the absence of which occasioned the discharge. [Lord DENMAN, C. J. We have often refused rules on this ground: we cannot have the same application repeated from time to time.]

Per Curiam. (a)

Rule refused. (b).

(a) Lord Denman, C. J., Patteson, Coleridge, and Wightman, Jn.

(b) See *Regina v. The Deptford Pier Company*, 8: A. & E. 910, 918.

*WILLOUGHBY, Clerk, v. Sir HENRY WILLOUGHBY, [*722
Baronet. Jan. 13:

Defendant in an action pleaded several pleas in bar, to one of which (extending to the whole cause of action) plaintiff demurred; on the others, issues of fact were taken. Defendant had judgment on the demurrer, the court holding the declaration bad. The issues in fact were tried, and found for the plaintiff, except one (extending to the whole cause of action,) which was found for the defendant, and was immaterial. Plaintiff, to avoid paying costs on this issue, moved for judgment thereon, non obstante veredicto, or for a repleader.

Held, that judgment non obstante veredicto could not be awarded, as it would be inconsistent with the judgment already given that the plaintiff should not recover.

And that a repleader could not be awarded, as the parties must, in that case, be ordered to replead from the plea downwards, and such direction would lead to an absurdity on the record, since the court had already held the declaration bad.

DEBT for arrears of a rent charge awarded in lieu of glebe and tithes under a private act, (6 & 7 W. 4, c. 16,) for dividing and allotting certain lands. The declaration set forth part of the act, whereby Edmund Gibson Atherley, Esq. was authorized to apportion the rent charge by award to be within six calendar months after the passing of the act, and, in case he should neglect or refuse to act, the bishop of the diocese was empowered, on application by the rector, &c., to nominate another person in Mr. Atherley's place, who should have the like power to award (within a certain time) as the original referee: and it averred that Atherley did neglect to act, and did not award, &c., within six calendar months; and thereupon the bishop, pursuant to and in exercise of the powers given him by the act, did, on application by the rector, appoint another referee, John Maurice Herbert, Esq.; and he duly made and published his award, charging lands of the defendant, under which award the rent charge in question was claimed. (a)

Pleas. 1. (After setting out the local act.) That Atherley made his award in pursuance of the act; and *plaintiff, before his application to the bishop, had notice of the said award, and submitted to and acted [*723

(a) See the declaration more fully stated in *Willoughby v. Willoughby*, 4 Q. B. 687.

upon it, without this that Atherley neglected, &c., for the space of six calendar months, &c., in manner and form, &c.: conclusion to the country. Issue thereon. 2. That the bishop did not, pursuant to and in exercise, &c., appoint Herbert, &c., in manner, &c.: conclusion to the country. Issue thereon. 3. That H. rbert did not duly make and publish his award, &c., in manner, &c.: conclusion to the country. Issue thereon. 4. That the lands charged, before and at the times when the payments now in question became due, and from thence hitherto, were and are in the possession and occupation of divers persons other than defendant, without this that defendant was possessed of the said lands or any or either of them, &c., at the times when the said payments or either of them became due and from thence to the commencement of this suit, or any portion of such time or times, in manner, &c.: conclusion to the country. Special demurrer, and joinder.

Plea 5 began by praying that the award might be enrolled among the records of the court; which was stated to be done accordingly. The award set forth in part the preamble of the local act, sect. 1, (a) and referred also to the recital, in sect. 32, that the rector of Marsh Baldon (the plaintiff) claims tithes out of certain lands of the said Sir H. Willoughby (the defendant) in the parish of Marsh Baldon, which the said Sir H. W. alleges are tithe free. The arbitrator awarded, among other things, that the plaintiff, as rector of Marsh Baldon, was, at the time of the passing of the act, well entitled to all and all manner of tithes, (except the tithes of corn and hay,) arising and growing from and upon the several *lands and grounds
 *724] in the parish of Marsh Baldon belonging to the provost and scholars of Queen's College, Oxford, and to all and all manner of tithes as well great as small arising and growing from and upon all the other lands in the said parish. And the rest of the award was in part grounded upon this adjudication.

The fifth plea then proceeded to allege that the said lands in the said parish of Marsh Baldon in the said statute mentioned, and to certain tithes whereof the defendant, before and at the time of the passing of the said act, was entitled as therein also mentioned, were, before and at the time of the passing, &c., and thence have been, and are, lands of great quantity and extent, to wit, &c., and were, during all that time, and are, other and different from the said lands in the said parish, in the said statute mentioned, and which last mentioned lands the defendant alleged were tithe free as in the said statute mentioned, and also were, during all the time, &c., and are, other and different from the said lands and grounds in the said parish in the said statute and in the said supposed award mentioned, and belonging to the provost and scholars, &c., as therein also mentioned: whereupon defendant says that he, defendant, ought not to be charged with the said debt by virtue of the said supposed award, and that the same was, and is, void in law: verification.

(a) See 4 Q. B. p. 667, note (a).

Replication. That, before and at the time of the passing of the said act, defendant was entitled to the tithes of corn and hay arising and growing from and upon the several lands and grounds in the said parish of Marsh Baldon belonging to the provost and scholars, &c.: without this that the said lands in the said parish in the said statute mentioned, and to certain tithes whereof defendant before and at the time of the passing of the *said act was entitled as therein mentioned, were and are other and different from the said lands and grounds belonging to the provost and scholars, &c., in manner, &c.: conclusion to the country. Issue thereon. (a) [*725]

Judgment on the demurrer was given for the defendant in Easter vacation, 1843, the court holding the declaration to be bad. (b) The issues of fact were tried before Lord DENMAN, C. J., at Westminster, in the ensuing Trinity vacation: and a verdict was found for the plaintiff on the first, second, and third issues, and for the defendant on the fifth. In Michaelmas term, 1843, *Thesiger*, on behalf of the defendant, obtained a rule nisi (c) for a new trial; and Sir *W. W. Follett*, solicitor-general, on behalf of the plaintiff, obtained a rule to show cause why a repleader should not be awarded, or judgment entered for the plaintiff on the last issue, non obstante veredicto, that issue being immaterial, inasmuch as, by the local act, sects. 30 and 71, the award was final and conclusive.

Cowling and *Montagu Smith* now showed cause. The plaintiff cannot have judgment non obstante veredicto, the court having decided that the declaration is bad, and that, even if it had been framed correctly, one of the pleas is a sufficient bar. As to a repleader, "the true rule is that where the court can give judgment on the whole verdict and pleadings no repleader ought to be awarded;" note (a) to *Parnham v. Pacey*, Willes, 532, 533, citing *Serjeant v. Fairfax*, 1 Lev. 32. (d) This rule *was recognised by the Court of Common Pleas in *Goodburne v. Bowman*, 9 Bing. 532, and, though apparently shaken by *Plummer v. Lee*, 2 M. & W. 435, in the Exchequer, was upheld by that court in *Negelen v. Mitchell*, 7 M. & W. 612, where it is laid down that, "if one out of several pleas traverses immaterial matter in the declaration, and the defendant pleads other material matters, which are disposed of on proper issues raised upon them, the reasons for a repleader cease." The contest here as to a repleader involves only a question of costs, since the defendant must have judgment on the whole record. Besides, a repleader "is not grantable in favour of the person who made the first fault in pleading;" note (6) to *Bennel v. Holbech*, 2 Wms. Saund. 319 d, 6th ed. (e) Here the first fault is in the declara- [*726]

(a) It is not thought necessary to explain this plea and replication by a fuller reference to the award and local act, as it was not disputed, on the argument of the present case, that the issue was immaterial.

(b) *Willoughby v. Willoughby*, 4 Q. B. 687.

(c) Still depending.

(d) See *Regina v. Governors of Darlington School*, ante, p. 682.

(e) And see *Gordon v. Ellis*, 7 Man. & G. 607, there cited in note (g).

tion. And the replender, if awarded, must begin from the first faulty pleading: "for when a replender is awarded, no error ought to be left upon the record. And therefore if the declaration be good, and the bar, replication and rejoinder ill, if a replender be awarded, all ought to be set aside but the declaration:" per POWELL, J., in *Kempe v. Crews*, 1 Ld. Ray. 167, 169. Here the declaration itself is bad. To grant a replender would be permitting the plaintiff to amend without payment of costs. [PATTESON, J. The first faulty pleading means a pleading which is faulty as leading to the immaterial issue; not one which is faulty in any respect whatever.] According to *Negelen v. Mitchell*, if the plea here is immaterial, the consequence should be judgment non obstante veredicto; but, if the declaration is bad, that could not be awarded. *The question arises on the face of the
 *727] record, and may more fitly be dealt with by a court of error than by this court on rule.

W. H. Watson and Hugh Hill, contra. As to judgment non obstante veredicto: the judgment on demurrer does not show that the declaration is bad, the form of judgment being only that the plea and the matters therein contained are sufficient to bar the plaintiff, &c. If the case were simply that of a good declaration, and a plea confessing, but endeavouring to avoid by raising an immaterial issue, the plaintiff would be entitled to judgment non obstante veredicto. Here several issues have been taken, and costs are payable on each, by stat. 4 Ann. c. 16, s. 5, and Reg. Gen. Hil. 4 W. 4, General Rules and Regulations 7, 5 B. & Ad. iv. The defendant, having judgment on the demurrer, is entitled to the general costs, and the plaintiff to the costs of those issues on which he succeeded. But the defendant ought not to have general costs of the immaterial issue on which he obtained a verdict; and the plaintiff asks to have a judgment entered which may prevent his being obliged to pay these. [PATTESON, J. How can the plaintiff have judgment non obstante veredicto? That would be judgment that he should recover, in opposition to the judgment already entered up, that he should not recover.] The judgment would be only as to costs on the immaterial issue. [PATTESON, J. How could you have judgment non obstante for costs? You are not entitled to costs; you only wish to avoid paying them. WIGHTMAN, J. What would be your form of judgment?] *The court might, on the immaterial issue, give a judgment
 *728] non obstante to the effect that the defendant should not have costs. It must be admitted that there is difficulty in framing such a judgment; yet, under the rule of Hil. 4 W. 4, the court ought to distribute the costs on each issue according to the result of the cause. As to a replender; the rule certainly is that a party cannot claim it where he has made the first fault; but here the first step towards an immaterial issue was taken by the defendant, in pleading that the award, though made conclusive by the statute, was not conclusive. The immaterial issue is wholly unconnected with the faulty part of the declaration. *Serjeant v. Fairfax*, 1 Lev. 32, would be a direct authority for the plaintiff, if this were the case of a single

issue, as before stat. 4 Ann. c. 16, s. 4. It certainly appears to have been decided, in *Negelen v. Mitchell*, 7 M. & W. 612, that, where there are several pleas, one tendering an immaterial issue, the court may look at the whole record, and, if they find another plea offering a good answer to the action, may refuse to award a repleader. But the practice introduced by stat. 4 Ann. c. 16, of pleading several pleas, ought to be attended by a corresponding change in the practice as to repleader; every branch of the pleadings should be considered as distinct, and each subject to the same rule which prevailed when a single plea only was pleaded, namely, that "the parties must begin again at the first fault which occasioned the immaterial issue:" note (6) to *Bennet v. Holbech*, 2 Wms. Saund. 319 d, citing *Kempe v. Crews*, 1 Ld. Ray. 167. If the court cannot in this case award either judgment for the plaintiff, non obstante veredicto, or a repleader, **Gwynne v. Burnell*, 6 New Ca. 453, shows the difficulty he would be subjected to in a court of error. [PATTERSON, J. If we granted [729 a repleader, this absurdity would follow. The repleading would begin from the plea. But of what use would this be, if we must say that the declaration is bad? We must make the record consistent when we give our judgment: and it would appear in the first place that the defendant was entitled to judgment because the declaration was bad, and yet we should adjudge that the parties must replead, commencing after the declaration.]

Per Curiam. (a)

Rule discharged.

(a) Lord Denman, C. J., Patterson, Coleridge, and Wightman, J.

The QUEEN v The Mayor, Aldermen and Councillors of the Borough of
CAMBRIDGE. Jan. 13.

Reported, 4 Q. B. 801.

*MARTHA STONEHEWER v. FARRAR. Jan. 14. [730

An award in an action where several issues are joined, and the costs are to abide the event of the award, ought to contain a distinct finding on each issue. For want of such finding the award will be bad for uncertainty unless (*semble per Lord Denman, C. J.*) it be clear, on the face of the award, that the arbitrator has in effect found on every issue.

Where an action for polluting the water of a watercourse was referred to an arbitrator, with power to him to regulate the enjoyment of the water,

Held, that an award directing a verdict to be entered for plaintiff, and that defendant should at all times take all proper and reasonable precautions for preventing the water from being rendered unfit for plaintiff's use, and, in particular, should use a process of filtering mentioned in the award, was bad for uncertainty.

The direction as to the particular process was, that the water passing from defendant's to plaintiff's premises should be passed through filtering lodges made or to be made by defendant, so as to be thereby purified and cleansed for plaintiff's use, "so far as the same can be purified, and cleansed by the ordinary and most approved process of filtering as aforesaid."

Held, that the description by reference only to the "ordinary and most approved process" was uncertain, and the award bad in this respect also.

CASE. The declaration stated that plaintiff before and at the time, &c. was, and from thence hitherto has been, and still is, lawfully possessed of

certain bleaching and dyeing works and premises, situate, &c., in and upon which said works and premises plaintiff, for and during all the time aforesaid, exercised, &c., the trade and business of a dyer and bleacher, and, by reason thereof, before and at the time, &c., of right ought to have had and enjoyed, and still of right ought, &c., the benefit of the water of a certain stream or watercourse in the county, &c., which during all that time of right ought to have run and flowed, and still of right ought, &c., into and through two reservoirs or lodges for water, theretofore made, unto the said works of the plaintiff, in a state to be used by the plaintiff in her said trade and business of a bleacher and dyer, without being polluted or mixed with injurious or noxious matter by the defendant as hereinafter mentioned. Yet defendant, well knowing, &c., but wilfully contriving, &c., while plaintiff was so possessed of her said bleaching and dyeing works, &c., and so exercised her said trade, &c. there, and was so entitled to such

*731] water as aforesaid, to wit on, &c., and on divers other days, &c., wrongfully cast, deposited and mixed, and caused to be cast, &c., into and with the waters of the said stream, &c., higher in the stream thereof than the said works, &c. of plaintiff, divers large quantities of lime and other injurious and noxious articles, materials, &c., and thereby the waters of the stream, &c. became polluted and mixed with the said injurious and noxious matter, and, being so polluted and mixed, the waters of the said stream, &c. have thence hitherto run and flowed down the said stream, &c., unto and into the said reservoirs, and thence unto and into the said bleaching and dyeing works, &c. of the plaintiff, in such polluted state and so mixed with injurious and noxious matter as aforesaid. By means whereof, &c. (allegation of damage by the reservoirs becoming filled with sediment, and the waters diminished and polluted, &c.)

Pleas, 1. Not guilty. 2. That plaintiff ought not at the said several times, &c., or any or either of them, of right to have had and enjoyed, nor ought she of right to have and enjoy, the benefit or advantage of the water of the said stream in the declaration in that behalf mentioned, nor ought the same during the time in the declaration in that behalf mentioned, or during any part thereof, of right to have run and flowed, nor ought it of right to run and flow into and through the said two reservoirs, &c., unto the said works of the plaintiff in a state to be used by the plaintiff in her said trade and business of a bleacher and dyer without being polluted or mixed, &c. by the defendant, in manner and form, &c.: conclusion to the country. Issues thereon.

The cause came on for trial at the Liverpool Summer assizes, 1842; when a verdict was found for the plaintiff *with 2000*l.* damages and *732] 40*s.* costs, subject to be reduced or vacated, and instead thereof a verdict for the defendant, or a nonsuit, entered, according to the award after mentioned. And it was ordered by the court that the cause and all matters in difference between the parties should "be referred to the award, order," &c., of, &c., (a barrister,) so as he should "make and publish his award in writing of and concerning the premises in question on or before,"

&c. And "that the arbitrator shall have power, if he shall think fit, to call in scientific or practical persons to assist him in his investigation:" and "shall also have power to regulate the future enjoyment of the water." The costs of the cause were to "abide the event and determination of the said award," and the costs of the reference and award to be in the arbitrator's discretion. The arbitrator made his award, which, after the usual recitals, proceeded as follows.

"Now these presents witness that I, the said," &c., "do make my award of and concerning the premises aforesaid in manner following, that is to say: I do award and determine that the said plaintiff had good ground of action against the said defendant, and is entitled to a verdict in the said action, and to recover therein damages against the said defendant to the amount of 40*l.*: and I direct that the verdict be for the plaintiff for the said sum of 40*l.* accordingly. And I further find and award that the said plaintiff is entitled to have and enjoy the benefit and advantage of the water of the stream or watercourse referred to in the declaration in the said action, and in respect whereof disputes and differences have arisen between the said parties as aforesaid, flowing into *and through two reservoirs or lodges for water unto the bleaching and dyeing works and [*733 premises of the said plaintiff in the said declaration mentioned, so as that the same water may at all times be used by the said plaintiff in and for the purposes of her trade and business of a bleacher and dyer, without being in any degree rendered unfit or less fit to be so used by the said plaintiff in consequence of the same water being polluted or mixed with injurious or noxious substances or matter, or otherwise detrimentally affected by or on the part or through the act or default of the said defendant in or in any wise relating to the carrying on his trade or business of a bleacher upon his works and premises, situate upon or near to and higher up the said stream or watercourse, by reason of the said defendant employing the water of the said stream or watercourse in his said last mentioned trade or business of a bleacher, or by reason of any thing relating to the carrying on of his said trade or business as aforesaid in any wise howsoever. And I further award and direct that, as regards the trade and business of the said defendant as a dyer, which has been by him carried on upon his said works and premises, the said defendant shall at all times take and use all proper and reasonable precautions and measures for the purpose of preventing the water of the said stream or watercourse from being, by the carrying on of the said defendant's trade or business of a dyer as aforesaid, or in consequence thereof, rendered unfit or less fit for the use of the said plaintiff in her said trade or business of a bleacher and dyer. And, in particular, I award and direct that the refuse and contents of the dyeing vats or vessels of the said defendant, when emptied out, and also all other refuse *water, liquid . [*734 or other materials or substances, which shall or may have been used in the carrying on of the said defendant's trade and business of a dyer as aforesaid, or shall arise therefrom or from any process connected therewith,

and which could in any wise pollute or injuriously affect the water flowing in and along the said stream or watercourse to the said works and premises of the said plaintiff, so as to render the same unfit or less fit to be used by the said plaintiff in her said trade or business of a bleacher and dyer, shall, before entering into and becoming mixed with the water of the said stream or watercourse, be, by and at the expense of the said defendant, passed into and through certain filtering lodges heretofore made, and situate between the said works of the said defendant and the said works of the plaintiff, or through other filtering lodges or filters, to be for such purpose made and completed by and at the expense of the said defendant, so as to be thereby effectually purified and cleansed for the use and benefit of the said plaintiff in her said trade or business of a dyer and bleacher, so far as the same can be purified and cleansed by the ordinary and most approved process of filtering as aforesaid. And I award and direct that the said filtering lodges or filters so heretofore made, or to be made, as aforesaid, shall, from time to time, by and at the expense of the said defendant, be maintained and kept in good order and condition, and be from time to time run off, emptied, cleansed and renewed when and so often as occasion shall require for the purposes hereinbefore mentioned. And I further award and direct that, when and so often as it shall by the said plaintiff be found or deemed necessary to open and clear out the said stream or watercourse

*735] hereinbefore mentioned or referred unto from and below the point at which the water from the said filtering lodges or filters enters or shall hereafter enter into the said stream or watercourse, not being higher up the same than heretofore, the same may and shall be opened and cleared by and at the expense of the said plaintiff." (Then followed a direction as to costs of the reference and award.) In witness, &c.

Baines, on behalf of the defendant, in Trinity term, 1844, obtained a rule to show cause why the award should not be set aside on the grounds: First. "That the arbitrator has not awarded specifically upon each of the issues."

Secondly. "That the award is uncertain, ambiguous, and not final, in the respects following: 1. It does not describe or ascertain in any way the precautions and measures which the defendant is to take for the purpose of preventing the water in the said rule mentioned from being, by his dyeing operations, less fit for the use of the plaintiff's business. 2. In the particular direction as to passing the refuse and contents of the dyeing vessels of defendant, and the refuse water, liquid or other substances, used in carrying on defendant's business as a dyer, he is required to pass it through certain filters heretofore made, or through others to be for such purpose made, so that the water may be purified by the ordinary and most approved process of filtering, without describing any such process, or stating how the ordinary or most approved process is to be ascertained. The third and fourth objections under this head were, that the award did not dispose of all the matters in difference, since it gave no direction as to the duty or obligation

of "cleansing out the watercourse: and that, in the only direction given as to cleansing out the watercourse, it was not stated for what distance or in what part the plaintiff was to be at liberty to open and clear out the same when and so often, &c. [*736]

With regard to the second objection, affidavits were made by persons experienced in chemistry and the processes of bleaching, who stated that the directions of the arbitrator as to filtering were, in their opinions, intelligible, practicable, and easy of execution, and that the "ordinary and most approved process of filtering" was well known to persons in the habit of purifying water by filtration; (a) that a manner of filtering, used at certain "bleaching works in Lancashire, was described in evidence before the arbitrator, and that the directions of the award were "in accordance with the means adopted at the said works" as described on the arbitration. [*737]

Wortley and *W. H. Watson* now showed cause. First. It is true that the arbitrator has not awarded in terms on both the issues; but he has substantially disposed of them; and "it is sufficient, if looking at the whole award, it appears that the matter is determined;" *Jackson v. Yabsley*, 5 B. & Ald. 848. In *Duckworth v. Harrison*, 4 M. & W. 432, the declaration was on an award; by the agreement of reference the costs of the reference and award were to abide the event of the award. In the action referred, issues had been joined on *nunquam indebitatus*, and on the replication to a plea of set-off, denying that plaintiff was indebted. The arbitrator awarded that the plaintiff in the action referred had not any cause of action against the defendant, and was not entitled to recover; and the Court of Exchequer held the award sufficient. Some doubt is, indeed, thrown on this case by the decisions of the same court in *Gisborne v. Hart*, 5 M. & W. 50, and *Bourke v. Lloyd*, 10 M. & W. 550, and by the ruling of

(a) One of the deponents, Mr. West, of Hunslet, in the parish of Leeds, lecturer on chemistry, &c., stated that he had long been conversant with the subject, and "that there is an ordinary and approved process of filtering water, that is to say, through gravel and sand; and that the said ordinary and approved process is well known to civil engineers, analytical chemists and other professional persons, as well as to many bricklayers, masons, well sinkers, navigators and other workmen engaged in constructing such filters. That such ordinary and most approved method is mentioned in the report of the commissioners appointed to inquire into the state of the supply of water to the metropolis, 1828; in the evidence of James Simpson and others before the said commissioners; in the article "Filtration," in Dr. Ure's Dictionary of Arts and Manufactures; in the Transactions of the Institution of Civil Engineers; and in other popular and well known books in common circulation. And this affirmant saith that, in the said several works and places hereinbefore referred to, such ordinary and approved process is described with greater or less minuteness in different instances, but is always spoken of as a matter well known and generally understood. And this affirmant further saith that, besides the great works of filtration at the Chelsea and Glasgow water-works, which affirmant has visited and knows to be easily examined, this affirmant believes, from his own knowledge of the neighbourhood of the plaintiff's and defendant's works, that the process of filtration and the construction of filtering beds are well known and understood among workmen thereabouts. And this affirmant further says that he has inspected and is well acquainted with the works of the said defendant, situate, &c., "and also with the works of the said plaintiff, situate," &c. And this affirmant further says that the directions of the said arbitrator in the said award, relating to the purification of the water by means of filters, are, in the judgment of this affirmant, distinct, intelligible and practicable."

PATTESON, J., in *Brooks v. Parsons*, 1 Dowl. & L. 691, in the Bail Court: but in *Avelett v. Goddard*, 11 Law J. (N. S.) Com. P. 123, Hil. T. 1842, (decided after *Duckworth v. Harrison*,) the Court of Common Pleas held *738] that "a finding by an arbitrator leading by necessary inference to the decision of the issue, is sufficient;" and they observed, "There have been several cases to that effect." *Lowe v. Allen*, 4 Q. B. 66, was the converse of the present case: there the arbitrator awarded negatively and affirmatively in the terms of the several issues, but did not formally state the general result; and that was held to be a good award. In *Bourke v. Lloyd*, the finding of the arbitrator was not appropriated either to any issue or to any part of the declaration; the court was called upon to make the award decisive by a construction of its own. *England v. Davison*, 9 Dowl. P. C. 1052, may be cited in support of the rule; but there the general finding for the defendant left it uncertain how the costs should be taxed on some of the issues: *Cooper v. Langdon*, 9 M. & W. 60, (not noticed in *Bourke v. Lloyd*,) shows that, where that objection does not arise, a general finding for the defendant, though on apparently inconsistent issues, will suffice, if such finding on all the issues can, upon any supposition, be consistent. The principal authorities, including *Cooper v. Langdon*, have been under the consideration of the Court of Exchequer this term in *Kilburn v. Kilburn*, (a) not yet decided. Here the arbitrator has, in effect, found for the plaintiff on both issues. It could not be necessary to *739] draw the award in the form of a postea. The finding, when compared with the respective issues, is not inconsistent; the only complaint is that it is not specific.

Then as to the next objection. [Lord DENMAN, C. J. Is it sufficient to say that the defendant shall take "all proper and reasonable precautions," but "in particular" that the contents of the dyeing vats be filtered? Suppose he did the specific thing, and you were not satisfied, could you then have an attachment against him for not using all proper and reasonable precautions?] He is to do the thing specified, but at the same time to use all ordinary and reasonable precautions. Then, as to the objection that the defendant is ordered to purify and cleanse "by the ordinary and most approved process," but the award does not state how that process is to be ascertained; it is not necessary that the arbitrator should himself give scientific instructions; it is sufficient if (as the affidavits show) the general directions of the award are intelligible, practicable, and easy of execution, and the "ordinary and most approved process" well known and readily ascertainable. [COLERIDGE, J. Suppose a question arose thirty years hence on the fulfilment of the award; must the court then go

(a) Since decided, 13 M. & W. 671. The court there lays it down, p. 674, that, "where the costs of the cause are to abide the event of the award, the award must either dispute specifically of each issue raised on the record, or it must be clearly inferred from it in which way each of these issues has been found, so as to enable the officer to tax the costs for the party whose favour each issue has been found." See *In the matter of Brown v. The Croyden Canal Company*, 9 A. & E. 522.

back to inquire what was the ordinary and most approved process thirty years before?] At all events it might be inquired then if he had taken all reasonable precautions. "In particular," here, may have the effect of a *videlicet*. The authority given to the arbitrator to regulate the enjoyment was a power which he might exercise or not at his option; *Angus v. Redford*, 11 M. & W. 69: if he has exercised it imperfectly, the award is not vitiated. The award would have been sufficient if "it had stopped at the clause requiring ordinary and reasonable precautions. But any [740 further direction that he might have given must have been carried out in detail by a scientific person: to require such directions as would leave nothing to be so supplied would make it impossible, in many cases, to frame a good award. In awarding a transfer of property, it is usual to direct that it be done by proper conveyances, or the most approved mode of conveyance, without specifying the deeds. [Lord DENMAN, C. J., mentioned *Winter v. Lethbridge*, 13 Price, 533. *Crompton*, for the defendant. There the matter said to be wrongly decided was beyond the submission. Lord DENMAN, C. J. It was a mere excrescence; the rest of the award was good.]

The remaining objections were not argued.

Baines and *Crompton*, for the defendant, were not called upon.

Lord DENMAN, C. J. Three objections to this award have been argued. The first is certainly embarrassing; and I hope a similar case to this will not arise again. All arbitrators would do wisely by finding distinctly on each issue: though I do not say that, where this is not done, the award may not raise so clear an inference of a finding on each issue as to exclude the objection of uncertainty. But it is better to avoid any such question. In this case, however, there are other objections which must prevail. The award is uncertain, as not describing or ascertaining the precautions which are to be taken. It states, first, that the defendant "shall at all times take and use all proper and reasonable precautions and [741 measures for the purpose" of preventing impurity in the water; and then it adds, "And, in particular, I award and direct" that the contents of the dyeing vats shall be passed through filtering lodges, so as to be thereby purified for the plaintiff's benefit, "so far as the same can be purified and cleansed by the ordinary and most approved process of filtering as afore-said." Now, in this clause, when the award, affecting to give a direction as to the cleansing of the water, says that the defendant shall use all reasonable precautions, and follows that up by the words, "and in particular" that the contents of the vats shall be passed, &c., it is just the same as if the particular direction were left out; for, although that were complied with, there may still remain something, alleged to be a direction of the arbitrator, the omission of which may become the subject of complaint, and ground for an attachment. I think we should leave an opening to much litigation and injustice if we held this general direction to be of any value. The particular words which follow are also too uncertain. The award

speaks of the "most approved process." By whose approbation is that to be determined? The witnesses who have made affidavits say that they understand the direction; but even they do not themselves state what, in their view, is the most approved method. It may be that the arbitrator risks the validity of his award if he attempts to set out the process, and does it imperfectly; but much more is risked by the generality of description introduced here. The arbitrator must make himself scientifically master of the subject: he is bound to understand it so fully that he may make a statement on *which no one can have a doubt, and that when the

*742] material acts prescribed have been performed, it may be seen that the award is complied with, and parties may not be put to inquire for the greatest number of approvers. If dangers are to be considered, the most important is that which parties may incur, of acting upon awards which do not finally settle rights.

PATTESON, J. In *Brooks v. Parsons*, 1 Dowl. & L. 691, I proceeded on the authority of *Bourke v. Lloyd*, 10 M. & W. 550. Whether this latter case be distinguishable from others on the ground stated by Mr. *Watson*, is for the Court of Exchequer to decide. Certainly *Cooper v. Langdon*, 9 M. & W. 60, was not brought to my notice. It was just possible that the finding upon several contradictory issues in that case might be consistent, on the supposition adopted by the court, though whether it is worth while to be so astute for the purpose of supporting an award, I do not know. I agree, however, in the position that an arbitrator ought to find specifically upon each issue, in order that litigation may be avoided. As to the other branch of objection; it is assumed that, if the award had stopped at the direction to use all proper and reasonable precautions and measures, that would have been sufficient: but I cannot conceive any thing more likely to bring on future litigation than such a general mode of statement. Contradictory evidence might have been offered at any subsequent time on the reasonableness and propriety of the measures. It was the arbitrator's duty to state what they were to be. It is suggested that the

*743] clause may be read as if the arbitrator directed *that reasonable measures should be taken, "namely" those specified immediately after. But the award is that "all" proper measures shall be taken, and, "in particular," one. Whether that particular mode, as pointed out, is intelligible or not, may be a question; but I think the award is bad altogether. In *Winter v. Lethbridge*, 13 Price, 533, the arbitrator had exceeded his authority in one particular direction; and the award, though bad as to this, was held not to be wholly void: but no case decides that, where an arbitrator has power, and in the exercise of it gives a faulty direction, that part of the award may be struck out and the rest preserved. The case in which it was held that an arbitrator might omit to exercise the power of specifically regulating the enjoyment cannot help an award where the arbitrator has undertaken to give a specific regulation, and has done it erroneously.

COLERIDGE, J. On the first point, I will only say that I adopt the observations of my lord and my brother PATTESON. As to the last, it has been suggested that, if the arbitrator has the choice of dictating a regulation or not, and lays down an imperfect one, it is not material. But I do not agree in this view. If the arbitrator goes wholly out of his jurisdiction, the award, on that point, is merely void, and need not be obeyed; but, if the direction be within the arbitrator's power, it binds, and ought to be clear in its terms. It is an expression sometimes used, that the court ought not to be astute in finding objections to awards; but I think the right rule extends to this, and no more, that we should construe *them candidly and sensibly, in the same manner as other documents. [*744

WIGHTMAN, J. I think it is important that an arbitrator, in making his award, should find on each issue. But, further, I am of opinion that this award is uncertain as to the mode of purifying the water. An award ought to be so express that there should be no difficulty or doubt as to the performance. In this case there is a twofold uncertainty; the specific mode is incompletely described, and it is left doubtful whether the adoption of that mode alone will fulfil the arbitrator's intention, or whether it is prescribed only in addition to the other "proper and reasonable precautions" directed by the award. The discussion we have heard shows the uncertainty; for Mr. *Wortley's* argument appeared to proceed on one view of the case, and Mr. *Watson's* on the other. Rule absolute.

*The QUEEN v. The Inhabitants of HEANOR. Jan. 14. [*745

Under stat. 5 & 6 W. 4, c. 50, s. 95, the judge has no power to direct the costs of an indictment for non-repair of a road, preferred by the direction of justices, to be paid out of the highway rate, except where there is a highway, and the liability to repair it is in dispute. Therefore, where defendant has been acquitted on the sole ground that the road in question was not a highway, and the judge certified for costs under this section, this court set the certificate aside.

WHITEHURST, in last Trinity term, obtained a rule calling on the prosecutor to show cause why the certificate for costs in this prosecution, granted by the lord chief justice of the Court of Common Pleas, should not be set aside. The following facts appeared on affidavit in support of the rule.

The prosecutor, under sect. 94 of the Highway Act, (a) gave information

(a) Stat. 5 & 6 W. 4, c. 50, s. 94, enacts that, if a highway is out of repair, and information thereof on oath given to a justice, he is to issue a summons requiring the surveyor, or person, &c., chargeable with the repair, to appear before the justices at special sessions for the highways, who are then to proceed in the manner after pointed out in that section.

Sect. 95 enacts, "that if on the hearing of any such summons respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor," &c., "it shall then be lawful for such justices and they are hereby required to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county," &c., "wherein such highway shall be, against the inhabitants," &c., for the non-repair; "and the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate

*746] that an alleged highway in the township *of Heanor, in the parish of Heanor, Derbyshire, was out of repair. The surveyor of the township and some of the inhabitants attended at special sessions, and admitted that the township was liable to repair all the highways within it, and that the road was out of repair as a public carriage way; but they denied that it was a highway at all for carriages; and it was not pretended that the road was out of repair as a bridle way. The justices ordered an indictment to be preferred against the inhabitants. This order was not set out, the deponent not being able to obtain a copy. The indictment was tried before TINDAL, C. J., at the Derbyshire Spring assises, 1844, when the defendants did not contest their liability to repair the road, if it was a public highway for carriages; but this fact was not proved by the prosecutor, and was negatived by the witnesses for the defence; whereupon the lord chief justice stopped the defence, and the jury found for the defendants. On 23d May, 1844, the prosecutor obtained a summons from TINDAL, C. J., to show cause why he should not certify for the prosecutor's costs. The summons was attended by counsel on 27th May, before TINDAL, C. J., who said that he would not make the order unless he was obliged to do so, but that he had no discretion; and his lordship accordingly(a) made the order, which was afterwards endorsed on the postea. His lordship was requested to insert in the order the fact *that the road

*747] was found not to be a highway, but declined to do so, observing that the defendants could have the advantage of his notes of the trial on a motion to set aside his order.

The affidavits in answer denied that the liability of the township to repair all the highways within it was admitted before the justices, or that the way in question was alleged not to be a carriage highway. They also stated that application had been made, on 15th April, 1844, to TINDAL, C. J., for his certificate for the prosecutor's costs; but that his lordship declined to say any thing in the matter till the result of a motion, which was to be made in this court, should be ascertained. That, on 19th April, this court was moved, on behalf of the prosecutor, for a verdict to be entered for the crown, or for a new trial to be had: which application was refused.(b) Some other facts were added to explain the delay in the hearing of the summons.

Humfrey and *Gale* now showed cause. If the judge had a discretion, the court will not review the exercise of it. Nor, if the law gives him

made and levied in pursuance of this act in the parish in which such highway shall be situate: provided, nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid to remove such indictment by certiorari or otherwise into his majesty's Court of King's Bench." See *Regina v. Martin*, note (a) to *Taylor v. Clemson*, 2 Q. B. 1037; *Regina v. Pembroke*, 3 Q. B. 801; *Regina v. Clark*, 5 Q. B. 887.

(a) See *Regina v. Heanor*, note to *Regina v. Great Doughton*, 2 Moo. & Rob. 448, note (a). The following is a copy. "The Queen v. The Inhabitants of Heanor. Upon hearing counsel, and the attorneys or agents on both sides, and by consent, I do order that the associate for the Midland circuit attend with the nisi prius record for the purpose of endorsing thereon any certificate for the prosecutor's costs pursuant to the statute. Dated the 27th May, 1844. N. C. Tindal."

(b) See post, p. 748, note (b).

such a discretion, will they inquire whether the judge conceived that he was entitled to act according to his discretion. "To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous;" *Regina v. The Justices of the West Riding*, 1 Q. B. 624, 631. All the requisites of stat. 5 & 6 W. 4, c. 50, s. 95, have been satisfied. [COLERIDGE, J. Out of what fund are the costs to come?] Out of the sums to "be levied by a highway rate. [COLERIDGE, J. But this is no highway.] That answer would leave the liability to costs [*748 to depend on the question whether the prosecution succeeded or not. [PATTERSON, J. The supposition in the section is, that the existence of the highway is admitted, and that the liability only is in dispute.] The interpretation clause, sect. 5, extends the meaning of "highways" to all roads. Besides, the justices have a discretion, as was decided, in *Regina v. Earl of Radnor*, (a) upon sect. 94; and, that being so, it must be assumed that the existence of the highway was admitted before the justices; and then, in a prosecution upon their order, the only issue legitimately before the jury would be as to the liability; and the existence of the highway would therefore not properly be in dispute. (b) There does not, however, appear to be any substantial reason why one question should not be tried at the expense of the parish as well as the other. Further, the record shows simply a verdict of Not guilty.

Whitehurst, contra, was stopped by the court.

LORD DENMAN, C. J. The lord chief justice of the Common Pleas, when he made this order, was not informed, as he ought to have been, of what had passed here upon the refusal of the rule nisi for a new trial. It was then distinctly stated that the section was inapplicable, as to costs, when there was no highway. When the party insisting upon the existence of the highway contended that, whether he succeeded or not, he was entitled to his costs, I was struck with the grossness of the injustice; and, finding that my brother PATTERSON had held that sect. 95 applies only where there is a highway and the question is confined to the liability, I ruled accordingly. Had these rulings been communicated to the lord chief justice of the Common Pleas, he would not have granted this certificate. I cannot, therefore, say that this has been an exercise of his discretion: he had not the facts before him. We must make this rule absolute. [*749

PATTERSON, COLERIDGE, and WIGHTMAN, Js., concurred. Rule absolute. (c)

(a) Note to *Regina v. Chedworth*, 9 C. & P. 288.

(b) Gale, in Easter term, 1844, (April 19th,) had moved, on this ground, in the present case, to enter a verdict for the defendants, or for a new trial: but the court (Lord Denman, C. J., PATTERSON, and WIGHTMAN, Js.) refused the rule. PATTERSON, J., stated that, on the Oxford circuit, he had decided that sect. 95 gave no power to certify for costs where the road was not a highway: and Lord Denman, C. J., added, that he himself, upon this ruling of PATTERSON, J., being cited to him, had ruled that the section applied only where the existence of the highway was admitted and the dispute confined to the liability.

(c) See *Regina v. The Inhabitants of Hicking*, Trinity vacation, 1845, and *Michaelmas term*, 1845.

*750] *The QUEEN v. The Justices of WARWICKSHIRE. Jan. 14.

On application for a mandamus to the sessions to enter continuances and hear an appeal, it appeared from the affidavits that an application to enter the appeal was made on the second day of sessions, and not before, and refused. It not appearing what the practice was, nor that the sessions had refused on any ground except that of the practice, this court discharged the rule for a mandamus.

Though it appeared that a question might have arisen whether the appellants were not precluded by a former appeal which they had entered but had not prosecuted; on which question this court gave no opinion.

ISAAC SPOONER, in last Michaelmas term, obtained a rule calling upon the justices of Warwickshire to show cause why a mandamus should not issue, commanding them to enter continuances, and hear the appeal of the churchwardens and overseers of the parish of Coleshill, in Warwickshire, against an order of justices removing Edward Sheffield, &c., from the parish of Kingsbury, in the same county, to Coleshill.

The affidavits on which the motion was made stated that the order was obtained in May, 1844, and, with the examinations, was served on the parish officers of Coleshill, who, on 12th June, 1844, served the officers of Kingsbury with a notice in writing of the grounds of appeal against the order, "and of their intention to try and prosecute an appeal against the same at the then next general quarter sessions of the peace to be holden at Coventry for the Coventry division" of Warwickshire. The removal was not made before the then next sessions, which were held at Coventry, 4th July, 1844. The parish officers of Coleshill did not appear at those sessions, and did not enter the appeal. The respondents appeared in support of the order, and applied for costs, which the sessions ordered to be paid to them, and which were paid by the parish officers of Kingsbury. After the sessions, on 19th August, 1844, the removal took place. On 30th September, 1844, the parish officers of Coleshill served upon the parish officers of Kingsbury a fresh notice of grounds of appeal, and of *their intention to prosecute and try at the then next general quarter sessions at Coventry.

The next sessions were held at Coventry on 16th October, 1844. On 17th October, the attorney for Coleshill applied to the clerk of the peace to enter the appeal; but he refused. Counsel, on the same day, moved, on behalf of Coleshill, to have the appeal entered for the purpose of trying it: the motion was opposed on behalf of Kingsbury; and the sessions refused to enter the appeal or permit it to be tried.

G. Hayes and Mellor now showed cause. The sessions had jurisdiction to give costs at the July sessions, on proof of notice of appeal, under stat. 8 & 9 W. 3, c. 30, s. 3. The decision at that sessions disposed of the first appeal. Then, as to the second, the application to enter was not made till the second day of the sessions. It does not appear that this was in time by the practice of the sessions: it is clear that the sessions were entitled to lay down the rule that all appeals should be entered on the first day. Further,

upon the merits, the appellants had no right to appeal after the first appeal had been disposed of in July. It is true that, under stat. 4 & 5 W. 4, c. 76, ss. 79, 84, the parish to which the removal takes place may treat either the service of the order, or the actual removal, as the grievance, and compute the time of appeal accordingly; *Regina v. Justices of Salop*, 6 Dowl. P. C. 28.(a) And, in *Regina v. The Justices of Middlesex*, 9 Dowl. P. C. 163 it was held that the notice of appeal, given *before the removal, did not preclude the party from appealing after the removal: but [*752 then the first notice did not specify the sessions: here the first notice did so, and was a notice, not merely of appeal, but of trial at the sessions named. In *Regina v. The Justices of the West Riding*, 2 Dowl. & L. 488, (b) it was held that the parish to which the removal was made could appeal, after the lapse of twenty-one days given by sect. 79 of stat. 4 & 5 W. 4, c. 76, at any time before actual removal, as well as after removal. That decision, however, does not show that a fresh appeal can be entered, after one has been regularly entered and disposed of: and indeed it may be doubted whether the decision be not in contravention of the policy of stat. 4 & 5 W. 4, c. 76, since the delay loads the removing parish with useless expense. Notice is in the nature of process; 2 Nol. P. L. 515 (4th ed.): the proceeding here resembles a second action for the same cause.

Isaac Spooner, contra. It is manifest that the sessions refused to enter at the October sessions, on the ground, not that the application was too late for that sessions, but that the appeal could not be entered at that sessions at all. Now, as to that, they clearly were wrong. *Regina v. The Justices of Middlesex*, 9 Dowl. P. C. 163, is in point: and that case was recognised in *Regina v. Stoke Bliss*, ante, p. 158.

LORD DENMAN, C. J. We think you are wrong on the first point. You ought to have shown that, *according to the practice of the sessions, your application on 17th October to enter an appeal was not made [*753 too late in the sessions.

PATTESON, J., concurred.

COLERIDGE, J. It is quite consistent with your affidavit that the sessions determined merely upon the point of practice, and that the practice agrees with their decision.

WIGHTMAN, J. If we are to make any presumption, it must be in favour of the decision of sessions.

Rule discharged with costs. (c)

(a) See *Rex v. The Justices of Cornwall*, 6 A. & E. 894.

(b) See *Regina v. The Justices of Lancashire*, 4 Q. B. 910.

(c) Lord Denman, C. J., said that the costs were given as on a case between the parishes and not on the ground that the application was against justices.

The QUEEN v. The Justices of HERTFORDSHIRE. Jan. 15.

If any one of the magistrates hearing a case at sessions be interested in the result, the court is improperly constituted, and an order made in the case will be quashed on certiorari. It is no answer to the objection, that there was a majority in favour of the decision without reckoning the vote of the interested party. Nor that the interested party withdrew before the decision, if he appear to have joined in discussing the matter with the other magistrates.

On appeal against an order, under stat. 4 & 5 Vict. c. 59, s. 1, directing the surveyor of the highways to pay the commissioners of a turnpike trust a sum of money to be laid out in the actual repairs of the turnpike road, the justices making such order are interested parties. So is a magistrate to whom money is owing which is secured upon the turnpike tolls.

H. HAWKINS, in last Easter term, obtained a rule calling on the justices of the peace for the county of Hertford to show cause why a certiorari should not issue, to remove into this court an order made at the general quarter sessions of the peace for the said county *on 8th April, 1844, on the appeal *754] of James Smyth against an order of two of the said justices, whereby it was ordered (a) that 9*l.* 5*s.*, part of the rate or assessment levied or to be levied under stat. 5 & 6 W. 4, c. 50, should be paid by the surveyor of the highways of the parish of Bygrave, in the said county, to the commissioners of the Baldock and Bournbridge turnpike trust, to be laid out in the actual repair of such part of the said turnpike road as lies within the said parish.

The affidavits upon which the rule was obtained stated the following facts. One of the magistrates at sessions, before whom the appeal was heard, was Mr. Fordham; he was also one of the magistrates who made the original order, and was a respondent in the appeal. Mr. Fordham, during part of the hearing, was in conversation with magistrates on the bench, and appeared to the deponent to take a part in the discussion as to the appeal. Another of the magistrates at sessions was Mr. Fitzjohn: he was a creditor of the Baldock and Bournbridge turnpike trust, and had money owing to him which was secured solely upon the tolls of that trust. He sat on the bench during the hearing and trial of the appeal, and retired with the other justices into a private room after the hearing. The justices, on returning into court from that room, confirmed the order, with costs. Statements were added to show that the objection to Mr. Fordham's and Mr. Fitzjohn's interference had never been waived.

In answer, Mr. Fordham deposed that he was on the bench during part only of the appeal, having gone away before such hearing was concluded; and that he took no *part in the determination. Mr. Fitzjohn deposed that he took no active part in the discussion or in promoting the determination, having only pointed out that the appellant had not attended the petty session to object; and he stated that he himself merely gave his vote as a magistrate; and that, when the magistrates retired into the private

(a) See stat. 4 & 5 Vict. c. 59, continued, by stat. 8 & 9 Vict. c. 59, to October 1st, 1846 and to the end of the then next session of parliament.

room to discuss the merits of the appeal, he took no part in the discussion, though he gave his vote in favour of confirming the order: that ten magistrates retired into the room; and that all but two voted for the confirmation.

Wordsworth now showed cause. First, Mr. Fordham was a mere nominal party to the appeal, and had no real interest in the decision. [Lord DENMAN, C. J. He might be liable to costs.] (a) He took no part in the determination; and therefore it was not affected by his interest. Mr. Fitzjohn can scarcely be said to be interested. The money, when paid, would not go to satisfy his claim, nor to increase the general funds of the trust, but must be applied to the actual repairs of the road. But, admitting that he was interested, it appears that there was, without his vote, a majority for confirming the order. In *Regina v. The Cheltenham Commissioners*, 1 Q. B. 497, an order of sessions was quashed because some of the magistrates were interested in the decision: but in that case without the votes of those interested there would not have been a majority for the order; and PATTESON, J., expressly guarded himself against deciding that the vote of an interested party vitiated the decision when it could not affect the *majority. A magistrate will not be called to account on a mere [*756 surmise that he must have influenced a decision on a question in which he is interested.

H. Hawkins, contra, was stopped by the court.

Lord DENMAN, C. J. I am clearly of opinion that this order of the quarter sessions must be brought up to be quashed. Both these gentlemen had a disqualifying interest. Mr. Fitzjohn, as a creditor, had an interest in the funds of the trust to which the money was to be paid. It is contended that, as the majority, without reckoning his vote, was in favour of the confirmation, the order is not vitiated. But, after making every possible deduction from the strength of my opinion, in deference to that of my brother PATTESON, still in my judgment a decision is vitiated by any one interested person taking part in it. We cannot enter into an analysis of the different motives which may have produced the decision: it is enough to say that a single interested person has formed part of the court. Then, next, Mr. Fordham, as respondent, might be liable to costs. I think the circumstances here supposed to be sufficiently strong to call upon him to show that he took no part in influencing the decision: and, even then, one would be sorry to see that a magistrate who was interested joined in the discussion at all. It probably never occurred to him that he was interested and disqualified. Still we must take care that interested parties do not join in deciding cases. I think that the *prima facie* case is not answered by the fact that Mr. Fordham left the bench before the actual decision took place: for it is quite consistent with this that he may *have joined in the discussion so far as to [*757 affect the result.

PATTESON, J. I suppose that, in *Regina v. The Cheltenham Commissioners*, 1 Q. B. 467, I was not satisfied that the interference of a single

(a) See stat. 4 & 5 Vict. c. 59, s. 3.

interested party was sufficient to invalidate the decision: in fact the interference of the interested parties did there turn the majority; and I suppose that I was satisfied with limiting my decision to that ground. But, on consideration, I think this is unsound: I think that it is very dangerous to allow an interested person to join, whether the majority turn on his vote or not. The magistrates discuss the question among themselves; and it is impossible to say what effect that discussion may have on the decision. The real question is, has an interested person taken any part at all? Here Mr. Fordham was a respondent, and ought to have taken no part. It is urged that we are not to call a magistrate to account on a mere surmise: and to that I agree. But here is more than mere surmise. Mr. Fordham is on the bench in conversation with other magistrates. The party making the deposition upon which the order is impeached was probably not near enough to hear what was the subject of conversation. But, as the appeal was then being heard, it is at least probable that the conversation related to that: and the fair inference is that it did so, since Mr. Fordham does not deny it. With respect to Mr. Fitzjohn, he was interested, though, it is true, remotely. Mr. Wordsworth reminds us that the money was to be laid out in actual repairs, and not carried to the general funds of the trust: but I do not see what difference that can make, since every contribution to the repairs must relieve the general funds.

COLERIDGE, J. I will merely add, as I was not present at the decision of *Regina v. The Cheltenham Commissioners*, 1 Q. B. 467, that I agree in the view now taken by my lord and my brother PATTESON. Whether there is a properly constituted court, is a question which must be prior to the decision. My brother PATTESON does not appear to have differed very decidedly, in *Regina v. The Cheltenham Commissioners*, from our present view: he there intimates that a magistrate who knows that he is interested, and still takes a part in the discussion, is not justified in saying that, because so many other magistrates were present, he could not have influenced the decision.

WIGHTMAN, J. I agree: and I meant, in *Regina v. The Cheltenham Commissioners*, to rest upon the principle on which we are now deciding; that we cannot enter into a discussion as to the extent of influence exercised by the interested party.

Rule absolute.

*759] *The QUEEN v. The LANCASTER and PRESTON Junction Railway Company. Jan. 15.

By a railway act, (7 W. 4, & 1 Vict. c. xxii.,) it was enacted that, for settling differences between the company and owners of land, the company should issue a warrant commanding the sheriff to impanel, &c., a jury, which jury should "inquire of, assess, and give a verdict for the sum of money to be paid," "by way of satisfaction or compensation," "for the damages" sustained from the company's acts. It was also provided that no proceedings had in pursuance of the act should be quashed or vacated for want of form, or removed by certiorari. The company issued their warrant to the sheriff, commanding him to impanel a jury "for the purpose of inquiring of, assessing, and giving a verdict for, the sum of money (if

any) to be paid" to C. "by way of satisfaction or compensation" "for the damages (if any) which shall have been done," &c. The jury, on the inquisition in pursuance of this warrant, found that C. "had not sustained any damage;" "therefore it was considered that no damages or sum of money be assessed," &c. *Held*:

- (1) That the jury, even though the words "if any" had not been in the warrant, would still have been authorized to find that there was no damage. And, consequently,
- (2) That the words in the warrant did not vary the duty imposed upon the jury, or prevent the warrant from being in pursuance of the act. Therefore,
- (3) That the proceedings were within the jurisdiction conferred by the act, and no certiorari lay

ATHERTON obtained a rule, in last term, calling upon The Lancaster and Preston Junction Railway Company to show cause why a certiorari should not issue, to remove into this court an inquisition taken on 2d July, 1844, "for the purpose of inquiring of, assessing, and giving a verdict for, the sum of money to be paid to James Cottam by way of satisfaction either for the damages (if any) done or sustained by reason of the execution of any of the works authorized by the act passed," &c., (7 W. 4, & 1 Vict. c. xxii.,) "or for or on account of certain other damages, loss, inconvenience or injury therein mentioned, together with all proceedings had thereon."

The company was incorporated by the style of "The Lancaster and Preston Junction Railway Company," by sect. 1 of stat. 7 W. 4, & 1 Vict. c. xxii, (local and personal, public,) "for making and maintaining a railway from the town of Lancaster to the town of Preston in the county Palatine of Lancaster." The act gives the ordinary powers to enter and take lands, &c., for the purpose *of the railway, making compensation, &c., and empowers parties to sell, &c. Sect. 63. "And for [760 settling all differences which may arise between the said company and the several owners and occupiers of or persons interested in any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted; be it further enacted, that if any corporation, trustee or other person so interested or entitled and capacitated to sell, agree, convey, or release as aforesaid shall not agree with the said company as to the amount of such purchase money or satisfaction or other compensation as aforesaid, or if any of the parties entitled to receive such purchase money," &c., "as aforesaid shall refuse to accept such purchase money," &c., "as aforesaid as shall be offered by the said company, and shall give notice thereof in writing to the said company within ten days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury, or if any of such parties as aforesaid shall for the space of ten days next after notice in writing shall have been given to the clerk," &c., "of any such corporation, or to any of such trustees or persons respectively, or left," &c., "neglect or refuse to treat, or shall not agree with the said company for the sale, conveyance, and release of their respective estates or interests," &c., "or shall by reason of absence be prevented from treating, or shall by reason of any impediment or disability," &c., "be incapable of making such agreement, conveyance, or release as

shall be necessary or expedient for enabling the said company to take such lands or to proceed in constructing the said railway," &c., or shall not disclose and *prove the state of the title," &c., "or in any other
 *761] case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands required for the purposes of this act, cannot be made, then and in every such case the said company shall, and they are hereby required from time to time to issue a warrant under their common seal to the sheriff of the said county of Lancaster, or in case such sheriff or his under-sheriff shall be one of the said company," &c., (provision as to cases where presiding officers may be interested,) "commanding such sheriff or coroner or other person to impanel, summon, and return, and the said sheriff, coroner, or other person, is hereby accordingly empowered and required to impanel," &c., "a jury of at least twenty-four sufficient and indifferent men, qualified according to the laws of this realm to be returned for trials of issues in his majesty's courts of record at Westminster; and the persons so to be impanelled," &c., "are hereby required to appear before the said sheriff, under-sheriff, coroner, or other person at such time and place as in such warrant shall be appointed, and to attend from day to day until duly discharged; and out of such persons so to be impanelled, &c., "a jury of twelve men shall be drawn by the said sheriff, under-sheriff," &c., "or by some person to be by them respectively appointed, in such manner as juries for trials of issues joined in his majesty's courts of record at Westminster are by law directed to be drawn; and in case a sufficient number of jurymen shall not appear at the time and place so to be appointed as aforesaid, such sheriff, under-sheriff," &c., "shall return other," &c., (de circumstantibus,) "to make up the
 *762] said jury to the number of twelve," (then follow provisos "as to challenges, summoning witnesses, and views;) "and such jury shall, upon their oaths," (power to the presiding officer to administer oaths,) "inquire of, assess, and give a verdict for the sum of money to be paid for the purchase of such lands, except for such interest therein as shall have been of right purchased by the said company from any other person, and also the sum of money to be paid by way of satisfaction or compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for the future temporary or perpetual or for any recurring damages which may be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed, or repaired by the said company, and which cannot or will not be further obviated, removed, or repaired by them, which satisfaction or compensation for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; and the said sheriff, under-sheriff," &c., "shall accordingly give judgment for such purchase money, satisfaction, or compensation as shall be assessed by such jury; which said verdict, and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive to all intents and

purposes upon all corporations and persons whatsoever." (Then follow provisos as to notice.) "Provided also, that in all such cases the party claiming such satisfaction or compensation shall be the plaintiff, and shall be entitled to all such advantage and privileges as plaintiffs are in actions tried in any of his majesty's courts at Westminster by law entitled."

Sect. 206 enacts, "That no proceedings to be had or *taken in pursuance of this act shall be quashed or vacated for want of form, [*763 or be removed by certiorari, or by any other writ or proceeding whatsoever, into any of his majesty's courts of record at Westminster or elsewhere; any law or statute to the contrary notwithstanding."

The company issued the following warrant.

"To the Sheriff of the County Palatine of Lancaster.

"We, The Lancaster and Preston Junction Railway Company, incorporated by an act," &c., "do, by this our warrant, (pursuant to the powers or authorities for that purpose given to us by the said act,) command you, the said sheriff, to impanel, summon and return a jury of at least twenty-four sufficient and indifferent men, qualified," &c., "to appear before you, the said sheriff, at," &c., "on," &c., "in order that you, the said sheriff, may, out of such persons so impanelled," &c., "swear or cause to be sworn twelve who shall be a jury for the purpose of inquiring of, assessing, and giving a verdict for, the sum of money (if any) to be paid to James Cottam, of," &c., "by way of satisfaction or compensation, either for the damages (if any) which shall have been done or sustained by reason of the execution of any of the works by the said act authorized, or for or on account of any damage, loss, inconvenience or injury, by reason of the execution of any of the powers of the said act, or for the future temporary or perpetual, or for any recurring, damages (if any) which may be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed or repaired by the said company, and which cannot or will not be further obviated, removed or repaired by them, (damages, loss, *inconvenience or injury, in respect of which the said James Cottam hath already received satisfaction or compensa- [*764 tion as required by the said act, excepted.")

An inquisition was taken in pursuance of the warrant, and was set out in the affidavits as follows.

"Lancashire, to wit.—An inquisition and judgment, had, taken and given at," &c., "on," &c., "before me, John Fowden Hindle, Esquire, sheriff of the said county palatine, pursuant and in obedience to a warrant made and issued under the common seal of the Lancaster and Preston Junction Railway Company, by virtue of an act," &c., "and to me, the said sheriff, directed, to inquire into and of certain matters in the said warrant specified, by the oaths of Thomas Clark," &c., "twelve sufficient and indifferent men, qualified, according to the laws of this realm, to be returned for trials of issues in her majesty's courts of record at Westminster, here duly impanelled, summoned and returned by me, the said sheriff,

and being sworn and charged as in and by the said warrant directed ; and which said warrant is hereunto annexed ; to inquire of, assess, and give a verdict for the sum of money (if any) to be paid to James Cottam in the said warrant named, by way of satisfaction or compensation, either for the damages (if any) which should have been done or sustained by reason of the execution of any of the works by the said act authorized, or for and on account of any damage, loss, inconvenience or injury by reason of the execution of any of the powers of the said act, or for the future temporary or perpetual, or for any recurring, damages, (if any,) which might be so done or sustained as aforesaid, and the cause or occasion of which should
 *765] have been in part only obviated, removed, or repaired *by the said company, and which could not or would not be further obviated, removed or repaired by the said company, (damages, loss, inconvenience or injury in respect of which the said James Cottam had then already received satisfaction or compensation, as required by the said act, excepted :) Whereupon the said jury, being so impannelled, summoned, returned, sworn and charged as aforesaid, upon their oaths did present, find and give their verdict, that the said James Cottam had not sustained any damage by reason or on occasion of the matters and things in the said warrant mentioned, any or either of them. Therefore it was considered that no damages or sum of money be assessed to the said James Cottam by reason of the matters and things in the said warrant contained, or any of them : whereupon I, the said sheriff, in pursuance of the said act, do pronounce and give judgment accordingly. In witness whereof I, the said sheriff, have hereunto affixed my hand, and the seal of my said office, the day and year first above written.

“JOHN FOWDEN HINDLE, Sheriff. [L. s.]

“Signed by me, Christopher Bland Walker, under-sheriff of the said county palatine of Lancaster, presiding at the taking of the said verdict, and pronouncing the said judgment, the same day and year first before written.
 “C. B. WALKER.”

Baines now showed cause. The affidavits merely set out the proceedings : and therefore the objections, if any, must arise only on the face of the inquisition. Three objections are suggested. First, that it does not
 *766] appear that twenty-four jurymen were impannelled, as required by sect. 63, nor that the twelve named in the inquisition were drawn from twenty-four, or made up by a tales. Secondly, that the sheriff has pronounced the judgment, and not the under-sheriff, who appears, on the face of the inquisition, to have presided. Thirdly, that the jury have given no damages. Now sect. 206 forbids removal by certiorari ; and, as this is manifestly a proceeding under the act, the objections cannot be entertained by the court ; at any rate not in this proceeding. The alleged informalities will not warrant the removal ; *Rex v. Casson*, 3 Dowl. & R. 36 ; *Rex v. The Justices of the West Riding of Yorkshire*, 1 A. & E. 563 ; *Regina v. The Sheffield Railway Company*, 11 A. & E. 194. If the proceedings are not warranted by the act, they are void, and a certiorari is unnecessary

Regina v The Bristol and Exeter Railway Company, 11 A. & E. 202, note (a). (He was then stopped by the court.)

Atherton, *contra*. The clause taking away the certiorari does not apply, because the proceedings are not instituted under the act, and the jurisdiction has not arisen. (a) Sect. 63 defines the functions of the jury: they have merely to ascertain the amount, and are not to inquire whether the complainant has or has not suffered any damages at all. The company are to issue their warrant only in the case of damage existing: by issuing the warrant they admit the fact of some damage. It is true that the words "if any" have been inserted in the warrant: and it may perhaps be argued that these words justify the jury in inquiring whether any damages at all have been suffered. If that be so, it merely removes the ques- [*767] tion by one step: for then the objection will be that the warrant, so framed, is not in pursuance of the act. The complainant by this proceeding is placed in a difficulty. If the company meant to dispute the fact of damage altogether, they ought to have done so by refusing to issue the warrant: then there would have been an application for a mandamus, and the question as to the fact of damage would have been determined by this court on the affidavits used in showing cause, or by a traverse to the mandamus. Here the inquiry has been transferred to a tribunal which was not intended to entertain such questions, and which is unfitted for them. The courts will watch proceedings of this kind narrowly; the more so, as the finding is conclusive, and there are no means of applying for a new trial. If application were now made for a mandamus, the answer would be that the inquiry had already taken place; for the case is not like that of *Walker v. The London and Blackwall Railway Company*, 3 Q. B. 744, where the sheriff would not allow the inquiry to proceed: here is a distinct finding. [COLERIDGE, J. That is, a finding which, if you are right, is not a finding justified by the act. If so, it will not prevent a mandamus.] The want of jurisdiction entitles the complainant to a certiorari.

LORD DENMAN, C. J. There may be, upon examination of sect. 63, room for a little more doubt than I at first could see: and perhaps it would have been better *if the company had issued their warrant without the words "if any." But these words make no difference as to the [*768] duty of the jury. They are to inquire and assess the damages: and, even if Mr. *Atherton* be right in his argument, that the issuing of the warrant admits the fact of some damage, that admission cannot bind the jury. The question, whether any damage has been sustained or not, is inseparable from the question, how much damage has been sustained. The words in the warrant, therefore, though it would have been better if they had been omitted, do not alter the duty of the jury; and all parties are bound by this verdict. And, if the proceedings show on their face a defect of jurisdiction, a certiorari is not wanted.

PATTESON, J., concurred.

(a) See *Rea v. The Justices of the West Riding of Yorkshire*, 5 T. R. 629.

COLERIDGE, J. The only questions are as to the form of the warrant and the conduct of the jury. The words "if any," though it would be better if they were away, do not affect the validity of the warrant: for, though the inquiry may go only to the quantum, that quantum may be nothing. Then the jury cannot be expected to give a farthing: strictly speaking, such a finding, if there were no damages, would be a violation of their oath as much as the finding of a large sum.

WIGHTMAN, J., concurre.

Rule discharged.

*769]

*THOROGOOD v. ROBINSON. Jan. 15.

It is not every wrongful act depriving a party of the possession of his goods that amounts to a conversion. Where plaintiff's goods and servants were on land which defendant recovered in ejectment, and defendant on entering under the writ of possession turned plaintiff's servants off the land, and would not let them remain for the purpose of removing the goods, there having been no subsequent demand or refusal: *Held*, that the jury might find that there was no conversion.

CASE for an excessive distress, with a count in trover for lime, flints and breeze. Pleas, to the count in trover, 1. Not guilty. 2. Not possessed. Issues thereon. No question arose on the counts for an excessive distress.

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings after last Michaelmas term, it was proved for the plaintiff that he was a lime-burner, and, in January, 1844, was in possession of some land and of the lime, breeze, &c., in the declaration mentioned, which were lying on the land. The lime had been burnt in kilns on the premises from chalk dug there by the plaintiff. The defendant had recovered judgment in ejectment for the land, and, on the day mentioned in the declaration, he entered under the writ of possession, and turned two of plaintiff's servants off the premises, who, at the time, were loading a barge there with part of the lime. He refused to let them do any thing to the kiln fires, or put any more of the lime on the barge. The defendant's evidence showed that he was entitled to the land as landlord of a person in whose absence the plaintiff had entered without title. The lord chief justice told the jury that it was not every dealing with another person's goods that amounted to a conversion, but only such as deprived the real owner of them; that under the circumstances it was reasonable that the plaintiff should have applied to the defendant to have the articles which belonged to plaintiff delivered to him again; but that it was a question *for the jury whether the conduct

*770] of the defendant was a conversion of the lime and breeze. Verdict for defendant on both issues.

Knowles now moved for a new trial on the ground that the verdict on both issues was against the evidence. The lord chief justice ought to have told the jury that the facts amounted to a conversion. Any act taking from a party even the temporary possession of his goods is a conversion; *Keyworth v. Hill*, 3 B. & Ald. 685. "A conversion seems to consist in any

tortious act by which the defendant deprives the plaintiff of his goods, either wholly or but for a time;" 3 Stark. Ev. 1156, 3d ed. 1842. In *Baldwin v. Cole*, 6 Mod. 212, (a) "a carpenter sent his servant to work for hire to the Queen's yard; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after. HOLT, C. J. The very denial of goods to him that has a right to demand them is an actual conversion, and no. only evidence of it, as has been holden; for what is a conversion, but an assuming upon one's self the property and right of disposing of another's goods, and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them." As to the second plea: the defendant must be regarded as a mere wrong-doer; he had never any title to the lime and breeze: the lime was indeed made from chalk dug *on the premises; but it had been converted into an article of a different species; and, when a person makes wine, oil [*771 or bread out of another's grapes, olives or wheat, it belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials which he has so converted; 2 Black. Comm. 404.

Lord DENMAN, C. J. In leaving this case to the jury, I endeavoured to act in conformity with the decision of this court in the case of *Needham v. Rawbone*, (b): and I said that it was a question for the jury whether the *conduct of the defendant in turning the plaintiff's servants off the premises, and not letting them take away the lime and breeze, [*772 amounted to a conversion or not. I think the jury might fairly find that it did not. The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. The plaintiff certainly had a right to

(a) See *White v. Teal*, 12 A. & E. 106, 111.

(b) *Needham v. Rawbone*, Mich. T. 1844. (Not reported.) The action was trover for wearing apparel, books, and other goods. Plea, Not guilty. On the trial, before Lord DENMAN, C. J., at the sittings in Middlesex after Michaelmas term, 1843, it appeared that the plaintiff had left his house, and, in it, the goods above mentioned, in the care of his servant. The defendant entered the premises, alleging an authority from the Court of Chancery, placed a man in charge of the house, took an inventory of the goods, locked up the rooms containing them prevented the plaintiff's servant from having access to the rooms, and finally obliged him to quit the premises leaving the property under the defendant's control. The lord chief justice thought there was no evidence of a conversion, and directed a nonsuit. *Cockburn*, in Hilary term, 1844, obtained a rule nisi for a new trial. In Michaelmas term, November 11th, 1844, before Lord DENMAN, C. J., WILLIAMS, COLERIDGE, and WIGHTMAN, J.

Whitehurst showed cause, and *Cockburn* and *Petersdorff* supported the rule. *Hartley v. Maxham*, 3 Q. B. 701; *Taylor v. Kinloch*, 1 Stark. N. P. C. 176; *Mallalieu v. Laugel*, 3 Car. & P. 551; *Agar v. Lisle*, Hob. 187, 5th ed.; *Philpott v. Kelley*, 3 A. & E. 106; *Summersell v. Jarvis*, 3 Brod. & B. 2; *McCombie v. Davies*, 6 East. 538; *Cuckson v. Winter*, 2 Man. & Ry. 313, *Wieding v. Aldrich*, 9 A. & E. 861, 867; Bull. N. P. 44; *Baldwin v. Cole*, 6 Mod. 212; *Keyworth v. Hill*, 3 B. & Ald. 685; and *Fouldes v. Willoughby*, 8 M. & W. 540, were cited. Lord DENMAN, C. J., said it did not appear by the evidence that the plaintiff had not acquiesced in the taking, or that he might not have had the use of the goods if he had desired it.

Lord DENMAN, C. J., in the same term, (November 25th,) stated, without further observation, that the court ordered the rule to be made absolute.

Cur. adv. vult.

Rule absolute.

the goods; but he should have sent some one with a proper authority to demand and receive them: if the defendant had then refused to deliver them, or to permit the plaintiff or his servants to remove them, there would have been a clear conversion; but it does not necessarily result from the facts proved in this case that the defendant was guilty of a conversion. I am inclined to think that the plaintiff is entitled to a verdict on the issue on the plea of Not possessed, which will probably be given up as it only affects the costs of that issue.(a)

PATTESON, J. The mere turning the plaintiff's servants off the premises could not amount to a conversion of the goods; for the defendant had a right to turn the servants off.

COLERIDGE, J. Neither the plaintiff nor his servants had any right to be upon the land; nor was the defendant bound to let them remain there for the purpose of removing the plaintiff's goods; what he was bound to do was, on demand, to let the plaintiff remove the goods; or to remove them himself to some convenient place for the plaintiff.

WIGHTMAN, J., concurred.

Rule refused.

(a) This was agreed to on the defendant's part.

*773] *VAN SANDAU v. TURNER and Another. Jan. 21.

To a declaration for false imprisonment, defendant pleaded, in justification, that the Court of Review in Bankruptcy ordered that plaintiff should stand committed for a contempt of the court, and that a warrant should forthwith issue for that purpose. And that Sir G. R., one of the judges of the said court, afterwards, on, &c., according to the course and practice of the said court, made and issued out of the same court, upon the said order, his warrant in writing, whereby, after reciting the order, he directed the tipstaff of the court to arrest, &c. On special demurrer, *Held*:

1. That the words "according to the course and practice of the said court," with the context, did not necessarily imply that Sir G. R., at the time of issuing the warrant, was a judge of the court.
2. Or that, by the practice of the court, when they ordered a party to stand committed for contempt, one judge might issue his warrant for the apprehension.
3. That these facts were essential to the plea.
4. That an arrest, conformable to the practice of the court, was not admitted by the demurrer. Assuming that the plea did, in substance, state the proceedings to be according to the practice of the Court of Review: *Held*, further,
5. That this court could not, on such general statement, pronounce the justification sufficient, since they could not judicially know rules of practice adopted by a court of recent origin, and never communicated to them. And
6. That, if they were to intend the practice of such court to resemble that of the superior courts at Westminster, it was not conformable to the practice that, on an order of commitment by the court, one judge should issue his warrant to apprehend.

TRESPASS for assault and false imprisonment, &c.

Second plea. That, before the committing, &c., and after the passing of an act, &c., (5 & 6 Vict. c. 122,) to wit on, &c., a certain order was duly made by the Court of Review in Bankruptcy of our lady the queen, in the matter of one John Martin, a bankrupt, and on a certain petition of the now defendants before then preferred and presented to the said Court of Review, and then pending therein; by which order, &c. The plea then

set forth the order, which recited the petition preferred by the defendants to the Court of Review in the said matter of John Martin. The petition recited certain proceedings in the said court, to which defendants were parties, in the matter of J. Martin, in the course of which the court made certain orders for retaxation of costs; and that, before the last order was finally drawn up, the now plaintiff caused to be printed a *handbill or circular, headed "Re John Martin, a bankrupt," &c.: and [*774 entitled "A statement of extraordinary frauds practised in this bankruptcy," &c. That the said handbill contained false, scandalous and defamatory matter of and concerning the said Court of Review, and the proceedings, judgment and order of the said court in the above mentioned matter, as well as of and concerning the defendants in reference to the proceedings above mentioned. That the now plaintiff circulated copies of such handbill in London and elsewhere, and also, on, &c., during the sitting of the said Court of Review, in open court, and in the presence of the court and of one of the now defendants, who was attending the court for the purpose of arguing a question in the said matter of Martin, delivered copies of the said handbill to divers persons attending the court, to the great scandal and contempt of the said court, and to the detriment of the defendants, suitors and solicitors thereof, in their professional character and reputation. That the plaintiff also sent copies of the said handbill to the commissioners of the Court of Bankruptcy, &c. And that, in what he had so done, he had committed a high contempt of the said court. And the petition, recited in the order, prayed that the plaintiff might immediately stand committed to the Queen's prison for such his contempt, and that a warrant might issue for that purpose, &c. The handbill was set forth in a schedule to the petition, likewise recited in the order of the Court of Review. The order, as stated in the plea, then proceeded as follows. "Upon hearing the said petition and schedule and the affidavits filed in support thereof and in opposition thereto read, and what was alleged by," &c., (counsel on each side,) "the said Court of *Review did order(a) that the now plaintiff should [*775 stand committed to the custody of the keeper of the Queen's prison until the further order of the said Court of Review, for his contempt of that court in writing, printing and publishing the aforesaid printed paper so set out," &c., "and that a warrant should forthwith issue for that purpose." (A direction followed, as to costs, which it is unnecessary to state.) The plea then continued: "And the defendants further say that, the said order having been so made as aforesaid, the Honourable Sir George Rose, one of the judges of the said Court of Review, afterwards, to wit on, &c., at the request of the now defendants, and according to the course and practice of the said Court of Review, made and issued out of the same court, upon the said order, his warrant in writing under his hand and seal, bearing date

(a) One of the objections to the plea, stated in the demurrer after mentioned, was, that the plea did not show any adjudication of the court in their order that the plaintiff had been guilty of a contempt.

the day and year last aforesaid, and directed to one William Henry Allen, tipstaff of the said Court of Review, whereby, after reciting that by the said order of the said Court of Review hereinbefore mentioned and set forth it was ordered that the now plaintiff should stand committed to the Queen's prison for his contempt, the said W. H. Allen was thereby willed and required forthwith upon receipt thereof to make diligent search after the body of the now plaintiff, and, wheresoever he should find the now plaintiff, to arrest and apprehend him, and him safely convey to the Queen's prison, there to remain until the further order of the said Court of Review; also willing and requiring all mayors, sheriffs," &c., "to be aiding," &c. "As by *776] the said warrant," &c., "will more fully appear. Which warrant they, the now defendants, according to the course and practice of the said Court of Review, afterwards, and before the arrest of the now plaintiff as hereinafter mentioned, to wit on," &c., "delivered to the said W. H. A., who then, and from thence until after the execution thereof as hereinafter mentioned, was the tipstaff of the said Court of Review, to be executed in due form of law, and requested him to execute the same accordingly. By virtue of which warrant the said W. H. A., so being such tipstaff as aforesaid, afterwards, and while the said order and warrant remained in full force, virtue and effect, to wit on," &c., "and within the jurisdiction of the said Court of Review, to wit at London aforesaid, and according to the course and practice of the said Court of Review, took and arrested the now plaintiff by his body in a certain dwelling-house there, and then, for the purpose of safely conveying the now plaintiff to the said Queen's prison, necessarily," &c., (justifying the particular acts of trespass,) "under and by virtue of the said warrant and for the cause therein specified, as the said W. H. A. and the now defendants might lawfully do for the cause aforesaid; which are the same supposed trespasses," &c. Verification.

Demurrer, assigning numerous special grounds, and, among others, two which will appear by the argument, and on which alone the decision of the court proceeded.

The demurrer was now argued.(a)

Kelly for the plaintiff. Supposing that, on the order here pleaded, a single judge of the Court of Review *could have issued the warrant, *777] it is not shown that Sir George Rose, at the time of issuing the warrant, was a judge of the court. The plea only states that, the order having been made, "the Honourable Sir George Rose, one of the judges of the said court," made his warrant. The words "one of the judges," are merely matter of description, showing what the party is at the time when he is mentioned. This court takes notice of the judges constituting its own bench, but it has no means of knowing who are the judges of the Court of Review. Another objection is that, even if Sir George Rose appeared to have been a judge during all the time in question, one judge could

(c) Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Ja.

have no power to issue his warrant, as Sir G. Rose is said to have done here, unless the order directed that he should make such warrant in the name of the court, and as its representative. The warrant should be the act of the court; and, if the judge at the time of issuing it had power to act on behalf of the court, that fact should have been expressly averred, as in indictments for perjury it is alleged that the officer administering an oath had power and authority to do so. Here it is not stated that Sir G. Rose acted as a member of the court, or was one when the warrant issued. Stat. 5 & 6 W. 4, c. 29, s. 25, empowers one judge of the Court of Review to exercise the functions of a court of record, but provides that he shall not commit for a contempt, that power being reserved to the entire court.^(a) Stat. 5 & 6 Vict. c. 122, s. 64, enacts that the Court of Review "may be formed by one judge of the said court," but, does not, at least in terms, give such judge the power of committing for contempt. [PATTESON, J. The contempt relied upon "here is a contempt of the whole court; the order, which is the judgment, is that of the court. The ques- [*778 tion, as raised by this plea, is whether, the court having ordered a party to be committed for contempt, a single judge can issue his warrant to carry the order into execution. It does not seem to turn upon the statutes.] In *Green v. Elgie*, 5 Q. B. 99, the warrant was ordered to issue under the seal of the Court of Review, and did so issue. The allegation that the proceedings were "according to the course and practice of the said court" cannot aid the plea. The ancient courts may have an immemorial practice; the Court of Review can have none except under the late statutes: its practice must be deduced from them, or cannot be taken to exist.

Sir F. Thesiger, solicitor-general, contra. First, the plea does, by clear implication, show that Sir G. Rose was a judge of the court when the warrant issued. He is described as such judge: and, if he was not one at the time in question, it could not be true that he, according to the course and practice of the court, issued his warrant out of the same court upon the said order. [WIGHTMAN, J. It might have been the practice that one of the registrars should issue the warrant on such an order. COLERIDGE, J. It is not said that Sir G. Rose, "as" one of the judges of the court, issued it.] The other averments imply it; and "any words which imply such a matter to be so, are sufficient; as if it be pleaded that A. was seised in fee and died, and the land descended to B. as his son and heir, this was held to be a sufficient averment that he died seised, though it be not said in express words that he died so thereof seised; for "otherwise it could not descend to B. as his heir;" note (9) to *Posterne v. Hanson*, 2 Wms. Saund. 61 m, citing *Hill v. Bolton*, 2 Lutw. 1165, 1172. "In trespass for three loads of oats, the defendant justifies for damage feasant, the plaintiff replies that tempore quo et diu antea he was parson, and took for tithes; though he does not say that he was parson at the time of the severance, yet it shall be intended;" Com. Dig. *Pleader*, (F 17.) [*779

(a) See stat. 1 & 2 W. 4, c. 56, s. 7.

Secondly, a single judge might issue his warrant of commitment for this contempt. The proviso of stat. 5 & 6 W. 4, c. 29, s. 25, forbidding one judge to commit for a contempt, has no application here, but refers to the cases where one judge (the court then consisting necessarily of more than one) sat alone for the exercise of those functions which he might discharge apart from the entire court. In those cases he did not sit as the court. But, under stat. 5 & 6 Vict. c. 122, s. 64, the court of review may be formed by one judge; the act of one, therefore, may be the act of that court of record, as much as if all were assembled. And, for a contempt in the face of the court, a mere unwritten order of the judge forming the court would be sufficient. When an indictment is found at the Central Criminal Court, one judge issues a bench warrant under his hand and seal, though the warrant is an order of the court. [COLERIDGE, J. It is not necessarily an order of the court. It may be issued at chambers. PATTESON, J. Sometimes it is an act of the court: but then it is confined to that part of the country for which the court sits. The warrant of a judge of the Queen's Bench runs throughout England. Lord DENMAN, C. J. If your case was that the one judge, at the time of making the warrant, constituted *the court, *780] you might have averred it in your plea.] The order here purports to be that of the Court of Review. Supposing it to be that of the full court, the question is, not of power to commit, which the court clearly has, but of practice; namely, whether, the court having made an order of commitment for contempt, such order may, by the course of the court, be carried into effect by the warrant of a single judge. Every superior court, whether ancient or modern, may make its own practice, of which this court will take notice. "The customs and courses of every of the king's courts are as a law, and the common law, for the universality thereof, doth take notice of them:" "Every court of Westminster ought to take notice of the customs of the other courts:" *Lane's Case*, 2 Rep. 16 b: and this rule was recognised in *Worlich v. Massy*, Cro. Jac. 67, and *Mounson v. Bourn*, Cro. Car. 518, 526. The warrant here is alleged to have been issued according to the practice of the court; and the plaintiff admits it by demurring.

Kelly, in reply. The words "issued out of the same court" afford no inference as to the person from whom the warrant proceeded: every process of a court issues out of it. In the case(a) cited from Com. Dig. *Pleader*, (F 17,) it was averred that the plaintiff "diu antea et tempore quo" was parson,(b) which made the pleading more certain than this. And here the allegation is made to justify an imprisonment, and involves the authority to imprison, which ought to be pleaded with the utmost strictness. *781] In *Wightman v. Mullens*, 2 Stra. 1226, the declaration, for an escape, stated that the prisoner, being brought before Sir William Chapple, one of the justices of our lord the king, at his chambers in Serjeants' Inn, was there committed to the custody of the marshal; and this

(a) *Sydley v. Dr. Mundford*, Cro. Car. 63.

(b) "Et adhuc est." See the grounds stated in giving judgment.

was held ill, one reason being that the court could not take notice that Sir W. Chapple had any power to commit him, "he being only styled one of the justices of the king, which every common justice of the peace is." If, indeed, the words "according to the course and practice of the said court" had the effect contended for, it would be needless to aver in any form that the person issuing the warrant was a judge of the court. [COLERIDGE, J. If we are to take notice of the practice, and the practice is that a judge issues the warrant, the averment does imply that the party who issued it in this case was a judge.] The averments requisite to show authority cannot be so dispensed with. If it had been stated that by the practice no warrant could issue unless under the seal of a judge, and that the warrant here issued according to the practice, the pleading would have been less uncertain, but it would have been argumentative. [COLERIDGE, J. In Com. Dig. *Pleader*, (E 7,) it is said that, "in assize, if the tenant plead that his father was seised and died seised, and he entered a" (as) "son and heir, it is good; though it may be that the father of the demandant abated after his ancestor died and before his entry: but it shall not be intended; for when he says, that his father died seised and he entered, the common intendment is, that he entered immediately."](a) There the words "son and heir" directly imply that the party entered in the *usual course of inheritance; and it is said that the tenant entered "as" son and heir. If it had [782 been said here that Sir George Rose, "as" one of the judges, &c., made the warrant, much of the present objection would have been removed. An allegation in assumpsit that the defendant promised to J. R., executrix, does not imply a promise made to her "as" executrix; *Henshall v. Roberts*, 5 East, 150. Again, the objection might have been diminished if the plea had stated that Sir G. Rose, "then being" one of the judges, &c., made his warrant. [PATTESON, J. Indictments for perjury always speak of the officer who administers the oath as "then and there" having competent authority.] As to the argument that one superior court will take notice of another's practice: the superior courts at Westminster, which have administered justice from time immemorial, may be deemed to know each other's practice; but this court cannot know the practice of a court recently established. And, even if this were not so, an important question would arise, whether the Court of Review could, by a rule of practice, delegate the power of issuing a warrant in the name of the court. They may direct that a warrant shall be prepared by a clerk or other officer; but it is their warrant. The court convicts of the contempt; and the court must likewise issue the execution. Upon their order for commitment a judge cannot issue "his" warrant: he is, for this purpose, a stranger.

The court took time to consider these points, and adjourned the argument on the others.

Cur. adv. vult.

*Lord DENMAN, C. J., on a subsequent day of the term, (January 31st,) delivered the judgment of the court. [783

(a) *Colthirst v. Bejushin*, Plowd. 21, 33. Per Mountague, C. J.

To a declaration in trespass for assault and false imprisonment the defendant pleaded a justification under the warrant of Sir George Rose, one of the judges of the Court of Review, under his hand and seal, founded on an order of the same court that the plaintiff should stand committed for a contempt of the same court and that a warrant should thereupon issue for his arrest. The contempt alleged was the publication, in the face of the court and elsewhere, of a scandalous handbill or circular.

To this plea a special demurrer was filed, of enormous prolixity, with no other statement of the points intended to be raised in argument than that they appeared in the causes of demurrer contained in the body of the same. We have, however, heard the case argued on two of these points, which we selected. (His lordship then stated them.)

We hold both these objections good. Supposing a judge of the Court of Review to possess the power of committing for the offence charged by his warrant, it ought to appear that he was such judge at the time of issuing such a warrant. As a general proposition, this is too clear to require any proof.

But we are also of opinion that a single judge of that court has no power to cause any one to be arrested by his individual warrant for the offence here stated, a contempt of the court itself. Such contempts are to be punished by the court itself: the sentence is to be their own proceeding, from a sense of the necessity of inflicting it at the time of its infliction, and therefore is not to be delegated to other hands. [*784]

For curing both these defects the same allegation in the plea is relied on. The learned judge on whose warrant the defendant acted is said to have proceeded "according to the course and practice of the said court;" and it is said that this would not be true unless the practice were for one judge of the Court of Review to issue his warrant for the apprehension of one against whom the court has made an order that he be arrested for a contempt; and, further, that the same averment cannot be true unless Sir G. Rose was, when he made his warrant, a judge of that court. We are by no means sure that those very general words can be by any reasonable construction so applied. Their meaning is fully satisfied by confining them to the mode of issuing the warrant, which may have taken place in the usual manner according to the practice of the court, though all the circumstances attending it were wholly inconsistent with that practice.

But, waiving this remark, and supposing the fair meaning of the plea to be that the execution of Sir G. Rose's warrant was conformable to the practice of the court, we must next inquire whether it is a good justification in point of law. The statute which creates the Court of Review,^(a) confers upon it all powers and privileges of the superior courts at Westminster; and it is urged that we are bound to take judicial notice of the practice of all such courts. Now, supposing it to be well established that we are bound to take notice of the practice of all the courts which have existed for cer-

(a) Stat. 1 & 2 W. 4, c. 56. s. 1.

juries, *can it follow as a legal consequence that we are bound to know all the rules and regulations of a new tribunal erected for [*785 purposes entirely different, and employing a course of procedure foreign to our own? The constituent act of parliament has conferred no special powers in case of contempt: and, if the court has laid down rules for its own guidance on that subject, this is a matter of fact which we have no means of knowing without their being communicated to us by their authority. Such communication has never in fact been made: and, if it had, we should still have had to consider whether the course of procedure described in the plea is legal. If, on the other hand, the justification is rested on the act of parliament, as conferring the powers of the superior courts on the Court of Review, and so, impliedly, the same power of committing for contempt as that which those courts exercise, then, far from deducing the right to do it, which has been pleaded as a justification of this arrest, we must take judicial notice of the want of such right; for we know that it is not in conformity with any powers exercised or claimed by the superior courts.

The demurrer is, however, said to admit as a fact that the warrant was issued in all respects according to the practice of the Court of Review: to which we answer, that a demurrer admits no more than is well pleaded; and the vague and general terms employed in this plea, susceptible of the restricted sense above pointed out, cannot be said to admit any fact as to the practice. To make such an admission available, the words relied on ought to follow the defendants' express allegation, as a fact, of the practice by which they *sought to justify their arrest of the plaintiff. Such an allegation, distinctly made, might have been traversed, as the [*786 present argument supposes, or it might have been demurred to, and then the fact of its existence would have been admitted, and the question of its legality brought before the court.

We do not accede to the proposition that we are bound to take notice of the fact that Sir G. Rose was a judge of the Court of Review at the time of issuing his warrant. But, if we did, our judgment must be equally for the plaintiff, inasmuch as we are clearly of opinion that the order of a court that one shall stand committed for contempt of that court, and that a warrant shall issue for his apprehension, gives no authority to any individual, whether a member of that court or not, to issue his warrant for that purpose.

Judgment for plaintiff.

*The QUEEN v. BADCOCK and Others, Trustees of TAUNTON [*787
Market. Jan. 22.

Stat. 9 G. 3, c. 44, empowered trustees to purchase certain lands, &c., in the town of Taunton, and convert them into a market place, and vested the lands, &c., and all buildings, &c., to be built thereupon, and the rents and profits, in the trustees and their successors, in trust, out of the first moneys to be raised under the act, to pay the costs of obtaining the act, all debts to be incurred by the purchase of the site and erection of the market, the expenses of lighting

certain streets in the town, the expenses of purchasing the stalls, &c., in the then present market, and also certain mortgages, and the interest thereof. It was enacted that, after the discharge of the same, and of all debts on account of the market, &c., the market, &c., should remain in the trustees in trust as an estate for the use and benefit of the parish of M. in Taunton, and should and might be applied by the trustees to the clothing, educating, and placing out apprentices of so many of the children of the poor inhabitants of M. as the trustees should from time to time direct. It was further provided that the share and proportion which the several grounds, &c., to be vested in the trustees by virtue of the act, were charged with to the land-tax and church and poor rates in the year 1768, according to the rents of the same as they were then rated, should be for ever paid by the trustees to the proper officers in lieu of all taxes, rates or impositions whatsoever.

The trustees erected a market under this act on the lands specified; all of which were in the said parish of M.

A subsequent act, 57 G. 3, c. lxxv., authorized the trustees to purchase additional ground within one thousand yards of the then present market, and appropriate it for the purposes of the market, and enacted that the same, when so set out, should be deemed and taken as part of the then present market place to all intents and purposes. It further provided that the former act, and all and every the authorities, powers, provisions, regulations, clauses, matters and things therein contained, except such as were thereby varied, &c., or as were repugnant to, or otherwise provided for by that act, should be in full force and effect, and should extend to, and be practised, applied, &c., for effecting the purposes of that act, as fully and effectually, to all intents and purposes, as if all such authorities, &c. were repeated and re-enacted in the body of that act with relation thereto. This act contained no provision affecting the subject of rating the additions thereby authorized, and no enactment in form repugnant or referring to the enactments in the former act on the subject of rating the market place.

Under the second act the trustees made additions to the market place, within the prescribed distance, but situate within the parish of B.; they occupied these additions themselves, and collected tolls in respect thereof. There was never any surplus revenue after paying the annual expenses and interest. The parish of B. rated the trustees to the poor rate in respect of these additions at the full ratable value for the time being, according to stat. 6 & 7 W. 4, c. 96. The trustees having appealed, no evidence was given, on the trial, of the proportion at which the additional site was rated in 1768; but it was shown that in 1817 it was rated at a lower value than in the rate appealed against.

Held, that the general words of incorporation in the second act must have such a meaning as would stand with reason and right, and must therefore be limited so as not to incorporate the provision in the first act as to the proportion of rating.

Held also, that, notwithstanding the special purposes to which the revenue was applied, the trustees were liable to poor rate in B. for the additions to the market place situate in that parish, and that the amount at which they were rated was correct.

ON appeal against a rate made for the relief of the poor of Bishop's Hull in the county of Somerset, whereby the appellants were rated as owners
 *788] and occupiers of certain buildings and butchers' stalls called Taunton Market in the parish of Bishop's Hull, the sessions confirmed the rate, subject to the opinion of this court on a special case, which was stated in substance as follows.

By an act of parliament, 9 G. 3, c. 44, intituled "An act for erecting a market house, and holding a market in the town of Taunton, in the county of Somerset; and for preventing the holding of any market in the streets of the said town; and for cleansing the streets, and preventing nuisances and obstructions therein; and for lighting certain streets in the said town," the trustees therein appointed were empowered to purchase certain ground and buildings within the town of Taunton, and to convert the ground into a place for holding the market, and for erecting a market house. And it was thereby enacted, (sect. 21,) "that all lands, tenements, and hereditaments, to be purchased by virtue and under the authority of this act, for the site of the said market as aforesaid, and all buildings, houses, sheds,

stalls, standings, and other erections, to be built or set up thereupon, and the rents, and profits arising from the same, shall be, and are hereby vested in the said trustees and their successors for ever; and that they shall stand seised thereof in trust for the several uses, intents, and purposes hereinafter mentioned and declared concerning the same; that is to say, the said trustees," "shall out of the first moneys to be borrowed or raised by any ways and means under the authority of this act, pay and discharge the costs and expenses of obtaining and passing this act; and shall, in the next place, pay off and discharge all debts that shall be incurred by the purchase *of the said lands," &c., "and all such charges and expenses [*789 as shall necessarily attend the erecting and constituting the same; and also the expenses of erecting, maintaining, and lighting of lamps in" certain streets "in the said town; and also expenses of purchasing the stalls and standings erected in the present market on market days," "and also certain mortgages," "and the interest thereof;" "and after the discharge of the same, and of all debts accrued on account of the said market and buildings, the said market and buildings, and the tolls, rents, and profits thereof, or arising thereby, shall be and remain in the said trustees in trust, as an estate for the use and benefit of the parish of St. Mary Magdalene in the said town of Taunton for ever, and shall and may be applied by the said trustees," "to the clothing, educating, and placing out apprentices of so many of the children of the poor inhabitants of the parish of St. Mary Magdalene as the said trustees" "shall from time to time direct or appoint." By sect. 25 it was further enacted, "that the share and proportion which the several grounds, houses, and buildings, which shall be invested in the said trustees by virtue of this act, did contribute or pay, or was or were charged with, towards the land tax, church and poor's rates, in the year 1768, according to the rents of the same as they were then rated, shall be for ever paid to the collector or collectors, and other proper officer or officers authorized to receive the same by the said trustees;" "and the said trustees shall for ever thereafter be charged with and liable to the payment thereof; and such payments as aforesaid shall be in lieu of all taxes, rates, or any impositions of what kind or nature *soever, to be paid in respect of the said market house and other houses and buildings to be [*790 erected by virtue of this act."

In pursuance of the act the trustees of Taunton market, in the year 1768, purchased the grounds and buildings mentioned in the act, and erected a market and market house on the said ground, all in the parish of St. Mary Magdalene, Taunton.

In the year 1817, the trustees, finding that the market was not sufficiently large, obtained an act, 57 G. 3, c. lxx., (local and personal, public,) intituled "An act for enlarging the market place and regulating the market in the town of Taunton, in the county of Somerset, and for improving the said town; and for amending an act of his present majesty relative thereto;" by which it was enacted (sect. 1) that it should be lawful for the trustees

"to treat, contract, and agree" "for the purchase of any messuages," &c., "gardens, and other ground, within one thousand yards of the site of the said present market; and after purchasing the same, to appropriate a competent part thereof for enlarging the market, for the sale of cattle, swine, and any other beasts, articles, and things, and for any other the purposes of the said market," "and that from and after the said additional ground shall be so set out for the purposes of the said market, the same shall be deemed and taken as part of the said present market place, to all intents and purposes," &c.

It was further enacted (sect. 24) "that the said recited act," (9 G. 3, c. 45,) "and all and every the authorities, powers, provisions, regulations, clauses, matters, and things therein contained, except such of them as are hereby varied, altered, or repealed, or as are repugnant *to or *791] otherwise provided for by this act, shall be in full force and effect, and shall extend to and be practised, applied, and put in execution for effecting the purposes of this act, as fully and effectually, to all intents and purposes, as if all such authorities, powers, provisions, regulations, clauses, matters, and things therein contained were repeated and re-enacted in the body of this act, with relation thereto."

The trustees under the authority of the last mentioned act purchased land and buildings within the parish of Bishop's Hull, within one thousand yards of the site of the old market, and within the town of Taunton, and converted the same into a butchers' market, being the premises in question.

The trustees are occupiers of the premises, and collect, by means of their clerk and agents, the tolls and money paid by those who frequent the market, in respect of the butchery and the stalls therein.

There is a debt of 18,000*l.*, charged by way of mortgage on the tolls of the market at 4*l.* 10*s.* per cent. interest, upon certain instruments or deeds poll, a copy of one of which accompanied the case: some of these securities are held by three of the trustees rated, and the last date of any of them is 1833. At Christmas, 1843, there was a balance of 359*l.* 4*s.* 8*d.* due to the treasurer of the trustees upon balance of account; which balance has been in some years greater and in some less, and has become due by reason of moneys having been from time to time advanced by him to defray the current expenses of the market: but the same is not charged by mortgage upon the tolls of the market. The revenue of the market is in most years

*792] sufficient to meet the annual expenses of the market, together with *the interest of the debts above mentioned: but no surplus has ever existed after payment of the said expenses and interest; and no part of the mortgage debt above mentioned has yet been paid off. Part of the houses and buildings, standing on so much of the site of the market as is in the parish of Bishop's Hull, was, in the year 1817, rated to the relief of the poor of that parish, thus: "Messrs. Brigdale and Co. bank, 15*s.*:" the remaining part of the said houses and buildings was not rated in that year. No evidence was given of any rate charged upon the said premises in the

year 1768, nor of the ratable value of the property, nor of any part thereof, nor of any rent paid for the same in that year. The two acts above mentioned of 9 G. 3, c. 44, and 57 G. 3, c. lxxv., were to be taken as forming part of the case. (a)

The ratable value of the premises in question was correct, supposing the trustees to be ratable for the same according to stat. 6 & 7 W. 4, c. 96.

At the trial of the appeal, the trustees contended, first, that they were not ratable at all, inasmuch as they had no beneficial occupation of the property rated, the tolls and moneys arising therefrom being entirely devoted to the purposes specified in the said acts for the regulation of the market: secondly, that, if ratable at all in respect of the said buildings, they were ratable only in one of the following ways: first, according to the share and proportion which the land and buildings taken by them under the act of 57 G. 3, c. lxxv. did contribute or pay, or were charged with, towards the poor rate in the year 1768, according to the rents of the same as they were then rated; or, secondly, according *to the share and proportion which the said land and buildings did contribute or pay, or were charged with, [*793 towards the poor rate in the year 1817, according to the rents of the same as they were then rated.

If this court should be of opinion that the trustees were not liable to be rated, or were ratable only in the proportion which the lands and buildings taken by them under the said act 57 G. 3, c. lxxv. did contribute or pay, or were charged with, towards the poor rate in the year 1768, according to the rents of the same as they were then rated, the order of sessions was to be quashed, and the rate amended by striking out the names of the trustees. If the court should be of opinion that the trustees were ratable only in the proportion which the land and buildings taken by them under the act 57 G. 3, c. 65, did contribute or pay, or were charged with, towards the poor rate in the year 1817, according to the rents of the same as they were then rated, the rate was to be amended by substituting 15*l.* as a ratable value of the market house and buildings, and 6*s.* 3*d.* as the rate thereon, instead of a ratable value of 250*l.*, and a rate thereon of 5*l.* 6*s.* 2*d.* If this court should be of opinion that the trustees were ratable for the said premises, according to stat. 6 & 7 W. 4, c. 96, the order of sessions was to be confirmed.

The case was argued on a concilium, in this term, (January 18th,) by *Moody*, in support of the order of sessions, and *Cockburn*, contra: and on this day *Moody* addressed some observations to the court as to the cases cited on the other side. (b)

The course of the argument appears sufficiently from *the judgment of the court. In addition to the authorities there referred to, [*794 the following cases were cited: *Rex v. Waldo*, Cald. 358; *Rex v. Commissioners of Salter's Load Sluice*, 4 T. R. 730; *Rex v. Terrott*, 3 East, 506;

(a) The later act contained no provision or reference on the subject of rating either the old or the new property.

(b) The first day's argument was before Lord Denman, C. J., and Patteson, Coleridge, and Wightman, J.; this day the same judges were present with the exception of Wightman, J.

Rez v. The Birmingham Canal Company, 2 B. & Ald. 570; *Rez v. Trustees of Weaver Navigation*; (a) *Rez v. St. Giles, York*, 3 B. & Ad. 573; *Rez v. The Commissioners for lighting Beverley*, 6 A. & E. 645; *Regina v. The Leeds and Liverpool Canal Company*, 7 A. & E. 671; *Regina v. The Blackfriars Bridge Company*, 9 A. & E. 828; *Regina v. The Justices of Worcestershire*, 11 A. & E. 57; *Regina v. Sterry*, 12 A. & E. 84; *Regina v. Wilson*, 12 A. & E. 94. Reference was also made to stat. 48 G. 3, c. 96, s. 26. *Cur. adv. vult.*

Lord DENMAN, C. J., in the vacation after this term, (February 12th,) delivered the judgment of the court.

One point to be decided in this case is, whether a clause in stat. 9 G. 3, c. 44, is to be considered as re-enacted by and introduced into stat. 57 G. 3, c. lxx. : and, if that shall be determined in the affirmative, it will not only settle the question of ratability so largely discussed at the bar, but also determine the principle on which the rating is to proceed. It will be convenient, therefore, to consider that question first. The latter act provides that all clauses in the former which are not by the latter "varied, altered, or repealed," nor "are repugnant to or otherwise provided for" by it, "shall be in full force and effect, and shall extend to and be practised, applied, and put in execution for effecting *the purposes" of the latter as fully *795] as if they had been "repeated and re-enacted in the body" of the latter, "with relation thereto." Except, therefore, in the excepted cases, the clauses of the former act are not only to remain in force, but are extended and applied to the carrying the latter into effect as fully as if expressly repeated in it. The clause in question does not fall within any of the exceptions unless it is repugnant to something in the latter statute: and it is difficult to contend this. It relates to the rating the property taken under the powers of the act in which it is found; but in the latter statute there is no rating clause provided, nor any from which it can be directly inferred that the trustees are not to be ratable at all: there can therefore be no repugnancy between the two statutes in this respect in any strict sense of the term; nor does it amount to repugnancy that there may be some difficulty in the application, or some inconvenience and hardship resulting to the respondent parish from its being so applied, though these considerations will have their weight in the argument that it was never intended to be so applied.

This remark, however, does not entirely conclude the matter. Upon general principles and authority, it may still be open to the respondents to contend that, large as the words are, and the exceptions being excluded, still the clause in question is not within the operation of the re-enacting clause. The clause itself is of a singular kind, passing over some minor difficulties which the language might present. It provides that the property to be vested in the trustees under the act shall for ever pay the same share or proportion *796] towards the land-tax, church and poor rates which it paid in 1768, according *to the rents of the same as it was then rated. In terms

(a) Note (c) to *Rez v. Liverpool*, 7 B. & C. 70.

this fixes, not the amount of the assessment, but the share and proportion which it is to contribute and pay toward the general rate. And this is neither an unusual nor an inequitable provision: the land was about to be devoted to purposes which it was conceived would be generally beneficial to the parish; and, if its own value should be thereby increased beyond that of the surrounding property, yet, in consideration of the general benefit, the former proportion in rating it was still to be preserved. The occupiers generally must be taken to have agreed that the then existing proportion was a fair one in the then state of things, and to agree to its continuing for ever under any alteration which the statute might occasion. Still it is obvious that the provision is in its nature of a special and limited kind, difficult to extend in its application beyond the time and the place; for what was fair with reference to the same parish and at the time of the act passing, may be most unjust when applied in another parish and fifty years later; and the same change of circumstances may, and in the present instance must unquestionably, prevent its application with any tolerable accuracy. Who can now tell whether the land taken by the trustees in 1817 was fairly rated in 1768? Who can tell, or how can it be ascertained, what was the amount of assessment on it then, or what proportion it bore to the general rate on the parish? See the observations of the judges on a similar clause in *Rex v. The Monmouthshire Canal Company*, 3 A. & E. 619, 635.

These considerations make it almost impossible to suppose that the framers of the latter statute intended to incorporate the clause in its terms: they probably intended *to do the same with regard to the rates of 1817 which the former act had done with regard to those of 1768: but [797 there are no words sufficient to carry into effect this intention. It is a sound rule of construction laid down in 2 Inst. 287, but applicable to modern as well as to ancient statutes, perhaps indeed more so from necessity in consequence of the looseness of expression which now prevails, that, "in construction of general references in acts of parliament, such reference must be made only as will stand with reason and right:" and, where a provision is in its original and natural application limited in respect of time and place, it is to give to general words of incorporation a meaning contrary to reason, and it may be, as in this case it is, contrary to right, to hold that they apply to it. There is authority for a more restrained rule. In *Rex v. The Justices of Surrey*, 2 T. R. 504, not cited in the argument, the question was, whether an appeal lay against a conviction by two justices under stat. 25 G. 3, c. 72, s. 9; and that depended on the construction to be given to the thirty-third section of the act, which in the largest terms incorporated all clauses, matters and things provided by stat. 12 C. 2, c. 24, "or by any other law now in force," for "securing," "mitigating," "adjudging, or ascertaining the duties or penalties thereby granted." There was no doubt that the words were large enough to incorporate a former appeal clause, (12 C. 2, c. 24, s. 45:) but, upon a review of all the statutes, the court thought it was not intended to give an appeal against the decision of two justices.

And, in delivering its judgment, ASHHURST, J., laid down something like: general rule. He said: the fair construction of the clause of reference
 *798] “seems to be this; that all the *general powers and provisions given and made in acts *in pari materia* shall be virtually incorporated into this, but that such provisions as are always considered as special provisions shall not. The power of appealing from the judgment of the justices seems to be of this kind, and does not attach without being expressly given.” This is certainly a much more special provision, as it appeared in the earlier act; one which it is more unreasonable to apply generally: and we think, therefore, that we are justified in putting such a limitation on the very general words of the clause of reference as shall prevent them from applying to this provision.

It becomes, therefore, necessary to consider the general question of the ratability of the land in question. And this, although largely debated at the bar, does not require a very long discussion now; for the principles upon which it is to be determined are well settled. Whatever difficulty exists in coming to a conclusion turns upon the application of the facts; and in this case we think there are one or two circumstances of a decisive character. The principles are these. To make ratability there must be occupation beneficial in its nature, that is, of a subject matter producing a valuable return, though not necessarily profitable in any given year on a balance struck of profit and loss. When such an occupation is established, the occupier is ratable in respect of it, unless he is merely a trustee for the public, receiving no individual benefit, except in common with and as one of the public. In such a case the law does not regard him as the occupier, but the public whom he represents. These principles are so well settled that it is unnecessary to cite the authorities which have established them;
 *799] and they are unambiguous and certain in their application, *except for one question, and that is, what is the meaning of the word *public*? Upon this, as might be expected, the cases are many, and the dividing line not always easy to be preserved. On the one hand, the trustees of the dock estates who received large rates and duties wholly applicable to the construction and maintenance of the docks and basins in a great public harbour, (*Rex v. Liverpool*, 7 B. & C. 61;) the trustees of a river navigation where all surplus of rates and duties after the making and maintenance was applicable only to the repair of the public bridges of a county and such other charges on the county as the magistrates in quarter sessions should order;(a) the municipal corporation of a borough receiving town and anchorage dues payable to the treasurer, and applicable under stat. 5 & 6 W. 4, c. 76, s. 92, to certain specified public purposes, with a provision, as to any surplus, that it should be applied under the direction of the town council for the public benefit of the inhabitants, and the improvement of the borough, (*Regina v. The Mayor, &c. of Liverpool*, 9 A. & E. 434;) have been held not ratable: and it was considered to be no ground

(a) See *Rex v. Trustees of Weaver Navigation*, 7 B. & C. 70, note (c).

for a distinction from the last of these decisions, that the property in respect of which the rate was imposed was locally situated in a parish out of the borough; *Regina v. Exminster*, 12 A. & E. 2. On the other hand, the governors of the poor of the city of Bristol, occupying land in a parish out of the city, and there lodging and employing their paupers, (*Governors of the Bristol Poor v. Wait*, 5 A. & E. 1;) and the guardians of a union comprising many parishes, who built and occupied a work-house in one of them, in which were *lodged and employed the paupers of all the parishes, (*Regina v. Wallingford Union*, 10 A. & E. 259;) were [*800 held respectively ratable for their occupations: and the latter case was considered not distinguished from the former by the circumstance that the land was in one of the parishes composing the union. It is unnecessary to advert to more cases; our business now is rather to see within which class the facts of this case bring it than to justify the distinction taken between them. At the same time we may remark that, in all the first class, the public, as such, unlimited by the bounds of county, borough or parish, had a substantial and direct interest in the benefit which the application of the funds produced; in the latter, the rate payers, or at most the inhabitants of certain parishes, were alone concerned in the benefit, direct or indirect. It seems to us clear that the facts here fall within the latter class. It appears that the proceeds of the property occupied are applicable after payment of purchase money, and the expenses of the market and lighting certain streets, "as an estate for the use and benefit of the parish of St. Mary Magdalene in the said town of Taunton;" and the mode of benefiting it is directed to be by "clothing, educating, and placing out apprentices," "the children of the poor inhabitants."

Whether the term "poor inhabitants" is limited to such as receive relief or not, we are unable to distinguish this in principle from the Bristol case. To the public properly so called it matters not by whom the poor children of this parish are clothed, educated and apprenticed. That they should receive anything beyond what the parish poor rate is bound to afford them, concerns the public so indirectly that its interest cannot be *con- [*801 sidered as tangible and substantial enough to be regarded at all in this question.

We are therefore of opinion that the order of sessions should be confirmed. As in the Wallingford case, so here, we think it not necessary to make any observation on the intermediate cases of property voluntarily appropriated to religious and charitable purposes; for we decide this case, as we did that, on the ground that, this property being beneficially occupied and not devoted to public purposes, the occupiers are subject in respect of it to the poor rate.

Order of sessions confirmed.

The QUEEN v. The Inhabitants of YELVERTOFT. Jan. 22.

Pauper was removed to his mother's maiden settlement in Y. His father, in the examination, stated that he believed that he himself was born in London, but had never heard in what parish, and had never done any act to gain a settlement in his own right. *Held* that, on proof of the mother's settlement in Y., the justices might remove pauper thither, and that, on appeal against the removal, the respondents, at sessions, might rely *prima facie* on the mother's maiden settlement, without proving any inquiry made as to the settlement of the father.

The mother's brother, in the examination, stated that she was born at Y., and was the person mentioned in a certificate of baptism, which was produced, and at the date of which he was less than four years old. *Held* to be evidence, on which the removing magistrates might act, of the mother's birth in Y.

The respondents, on the hearing of an appeal, may prove their case by a witness not produced before the removing magistrates; and may omit calling a witness who appeared before the magistrates, though the appellants require it and the witness is in court.

On an appeal against an order of two justices, whereby Charles Page was removed from the parish or township of Blaby, in Leicestershire, to the parish or township of Yelvertoft, in Northamptonshire, the sessions confirmed the order, subject to the opinion of this court upon a case, which was substantially as follows.

The examinations, so far as they are material, were; First: the examination of the pauper, to the effect *that he had gained no settlement
 *802] in his own right. Secondly: Charles Page, senior. "I believe I am upwards of sixty-four years of age, and was born, I believe, in London, but in what parish I never heard. I was brought up by my grandfather, at Yelvertoft in the county of Northampton, from about the age of two and a half years, and never saw my parents above three or four times afterwards, and do not know where they belonged: I have never done any act to gain a settlement in my own right. I was married, at Yelvertoft church, on Yelvertoft feast, Tuesday, when I was about twenty-six and a half years old, to Catherine York, single woman, by whom I had six children, one of whom is the pauper, Charles Page the younger, who was born at North Kilworth, and is about thirty years old. I have heard that my said wife was born at Yelvertoft, where I remember her parents living, and where I believed they belonged. I never heard the place of her settlement was out of Yelvertoft. She died at North Kilworth, about twenty-three years ago." Third: Thomas York. "I believe I am fifty-nine years of age, and was born at Yelvertoft. My father Samuel and my mother lived there ever since I can recollect. I lived with them until they died. Catherine York was my sister, and younger than me; she was born at Yelvertoft. She is the same person who is mentioned in the certificate of baptism now produced, marked "A," as being baptized at Yelvertoft on the 6th day of July, 1788, and the same person who was afterwards married to Charles Page the elder. I was present at the marriage. I believe my father, Samuel York, belonged to Yelvertoft."

The grounds of appeal were: First, that the said order and examinations

whereon the same was founded, *and the notice thereof, are informal and bad on the face of them, because the pauper, Charles Page the younger, appears in and by the said examinations, to be removed to his derivative settlement ex parte maternâ, while it does not appear that any due examination or inquiry has been made to ascertain that the said pauper had no derivative settlement ex parte paternâ; but, on the contrary thereof, Charles Page the elder, the father of the said pauper, states his belief that he, the said Charles Page the elder, was born in London; and no primâ facie evidence was given that he was not there born, or that he acquired no birth settlement thereby. Second, that there was no legal or sufficient evidence given before the said removing magistrates, or shown in the said examinations, that Catherine Page, the mother of the said pauper, was born in the parish of Yelvertoft. [*803]

The respondents, at the trial, proved the birth of Catherine Page at Yelvertoft, by a witness not examined by the removing justices, and did not call Thomas York, whose examination is above set out. The appellants contended that the order ought to be quashed, on the objection stated in the first ground of appeal, and also that it was not competent to the respondents to support their order without calling Thomas York as a witness, he being in court, and the appellants requiring that he should be called. The sessions held that the examinations were sufficient in respect of the objections taken in the first ground of appeal, and that it was not necessary for the respondents to call Thomas York as their witness, although he was in court and the appellants required that he should be called.

If this court should be of opinion that the sessions were not justified in both or either of the above decisions, *the order of removal and order of sessions were to be quashed: if this court should be of opinion that the sessions were justified in both the said decisions, then both the said orders were to stand confirmed. [*804]

K. Macaulay and *J. W. Simpson*, in support of the order of sessions. First, Catherine Page's birthplace was proved by the evidence of her brother, Thomas York, who was fifty-nine years old, and older than Catherine. [Lord DENMAN, C. J. There clearly is some evidence of her birthplace.] Secondly, the respondents are not bound to call a witness because he has appeared before the removing magistrates. [Lord DENMAN, C. J. I think you may leave that point to be discussed by the other side.] Thirdly, no further inquiry was necessary, as to the settlement of the pauper's father. It appeared that he was born somewhere in London, but not that there were any means of discovering in what part of London he was born. The respondents, therefore, were justified in relying upon the mother's settlement. [COLERIDGE, J. Can you remove to a parish, when you have reason to believe that the pauper is settled in another, though not ascertained parish?] In *Rex v. St. Mary, Beverley*, 1 B. & Ad. 201, a married woman was removed to her maiden settlement; it appeared that her husband was settled in some parish of Ipswich, but it was not shown in which; and the

removal was held bad. There it sufficiently appeared, that the husband had some settlement: and here, if it were clearly shown that the father had some birth settlement, the removal would be bad. But the justices were

*805] not satisfied of that fact; and they are the proper judges of the fact.

*And, when the objection was raised upon the appeal, it was for the sessions to determine whether the evidence of the father conveyed sufficient information to make further search necessary, or showed any settlement at all. The court will notice that the sessions, on such a point, generally possess means of knowledge, as to the particular place in question and many other circumstances which this court cannot have; *Regina v. The Recorder of Pontefract*, 2 Q. B. 548, 557; *Regina v. Bridgewater*, 10 A. & E. 693, 698. But, further, it has never been decided that no removal to the mother's settlement is good unless that of the father be negatived. The contrary in effect was ruled in *Rex v. Woodsford*, Cald. 236. [PATTESON, J. It rather seems that, in that case, the sessions held that the maiden settlement insisted on by one party, was enough until the opposite party proved the marriage: they do not seem to have held that, assuming the marriage, the maiden settlement was *prima facie* good.] This court, however, assumed the marriage, and laid down the rule generally, saying: "It may be, the husband had no settlement; and if he had, till discovered, her own would in the mean time remain." [COLERIDGE, J. Suppose you proved a birth settlement, and the other side proved a hiring and service, but were unable to show where it took place.] The birth settlement would then be good.

In *Rex v. Westerham*, 2 Bott. 68, pl. 108, (6th ed.) a married woman was removed to her maiden settlement; and this was held good, though it was found that the husband was born in Wiltshire, but it was not known in what parish or place. [COLERIDGE, J. He might have been born in an extra-parochial place.] So might the *husband in this case. In *Rex v.*

*806] *Ryton*, Cald. 39, the removal of the wife to her maiden settlement was held good, nothing being known as to the husband's settlement. *Rex v. Edisore*, Cald. 371, is to the same effect. So, in *Rex v. Harberton*, 13 East, 311, a married woman was removed to her maiden settlement, and this was held good, there being no legal evidence of the husband's settlement. That case, as well as *Rex v. Woodsford*, and *Rex v. Westerham*, is commented on in the judgment in *Rex v. St. Mary, Beverley*, 1 B. & Ad. 201, where it is clear that the maiden settlement would have been upheld, had it not appeared, positively, that the husband had a settlement. In *Rex v. St. Mary, Leicester*, 3 A. & E. 644, a pauper was removed to his birth settlement: his mother's settlement in a different parish was shown; but it did not appear that any attempt had been made to ascertain his father's settlement; and it was held that the removal was bad. That does not show that it is necessary to exhaust the information attainable as to the father's settlement; it rather proves the contrary. Reference was there made to *Rex v. St. Matthew, Bethnal Green*, Burr. S. C. 482, 485, where it was said, by WILMOT, J. that "the positive law in these cases of settlement, is

‘that the child’s settlement follows that of his father, if the father’s can be found; and that no recourse shall be had to the mother’s settlement, till that of the father can be traced no further.’” The decision in that case need not be impugned; but the particular expression of the rule is, perhaps, not quite accurate, and appears to sanction a principle unnecessary to the decision. The effect of the decision is, merely, that *the pauper’s settlement will follow that which his father has ex parte ma- [*807 ternâ, rather than his own mother’s, because the father’s settlement, whether derivative or not, is preferred to that of the mother. It is difficult to assign limits to such an investigation as the principle asserted on the other side would require. The father’s birth settlement could take effect only in default of the settlement of the grandfather and grandmother being known; and so on ad infinitum. Further, it is not to be assumed that the evidence as to the birth of the father is true: the appellants were not entitled to assume all the facts asserted before the justices; *Regina v. Latchford*, ante, p. 567.

Hildyard, contra. First, the only evidence as to the birth of Catherine Page, is that of Thomas York, who must have been born about October, 1784,(a) and who, therefore, on the 6th of July, 1788, the date of Catherine Page’s baptism, would be not four years old: his age at the time of her birth does not appear. [COLERIDGE, J. To how early a time of his life may a party speak? PATTESON, J. You have only his own evidence as to his being so young at the time of the baptism.] (The point as to calling the witness at the sessions was not argued.) As to the point on the father’s settlement. It appears from *Regina v. Leeds*, 5 Q. B. 916, that reasonable inquiry must be made for the father’s settlement; though, in that case, the court held that the inquiry, the absence of which was objected to, was such as could not justly be demanded. The evidence given before the removing justices, who are exercising a statutory *power under the act 13 & 14 C. 2, c. 12, must show facts authorizing the removal; [*808 the order cannot be made good by facts afterwards supplied. If it appeared that a pauper had been hired and served for a year, but that during the year he had resided more than forty days in each of two parishes, the justices would not be authorized to remove him to either, unless they had evidence to show in which parish he last resided. The maiden settlement was absolutely merged by the marriage; a birth settlement is good till it be shown that some other exists; but here the settlement of the wife was at an end, whether the husband had a settlement or not. It is contended that the husband might have been born in some ex’ra-parochial place of London; but that argument might as well have been urged in *Rex v. St. Mary, Beverley*, 1 B. & Ad. 201. The necessity of making reasonable inquiry into the husband’s settlement is recognised in *Rex v. St. Mary, Leicester*, 3 A. & E. 644.

LORD DENMAN, C. J. I think this case must be governed by *Rex v. Harberton*, 13 East, 311, where “the court said that there could be no doubt

(a) The order of removal was dated 14th October, 1843.

but that the evidence, offered by the respondents, of the wife's maiden settlement was *prima facie* sufficient; and that it lay upon the appellants to rebut it by giving evidence of the husband's settlement in a different parish." There has been no ruling the other way. In *Regina v. Leeds*, 5 Q. B. 916, the court merely decided that the sessions had done right even upon the principle insisted upon by the appellants; but the truth of the principle itself was not decided upon. In *Rex v. St. Mary, Leicester*, the *mother's settlement prevailed. In *Rex v. St. Mary, Beverley*, the *809] maiden settlement was superseded by distinct proof of the father being settled. According, indeed, to the rule laid down in *Rex v. St. Matthew, Bethnal Green*, Burr. S. C. 485, referred to by me in *Rex v. St. Mary, Leicester*, it would appear to be necessary that some inquiry should always be made into the father's settlement; but *Rex v. Harberton*, lays the burthen upon those impugning the maternal settlement. It is, no doubt, extremely desirable that such an inquiry should be made. Here, however, there really is no evidence of any settlement of the father, nothing to induce a prudent man to make inquiry. Suppose some other person had said that he had heard that the father lived in a particular parish; that might suggest inquiry: but what proof of settlement is furnished by a man saying, "I believe I was born in London, but I do not know in what part of London." The sessions, therefore, might well hold that all necessary inquiry had been made.

PATTESON, J. I cannot distinguish this case from *Rex v. Harberton*, 13 East, 311. It is there said to be sufficient, *prima facie*, to show the maiden settlement, and that the onus of displacing it by the husband's settlement is then thrown upon the opposite party. Although it is clear that, when there is proof of the father having some settlement, the maiden settlement of the mother does not take effect, yet, if nothing appears as to the father's settlement, it is otherwise. Thus, in *Rex v. St. Mary, Beverley*, 1 B. & Ad. 201, *the wife's maiden settlement did not prevail, *810] because it was proved that the husband had some settlement in Ipswich: and, had any such proof been given here, the same result would have followed. But all that we here find is, that the father believed he was born somewhere in London. The *prima facie* evidence of the mother's maiden settlement must therefore prevail, according to *Rex v. Harberton*, which has never been shaken. The other objections have been already disposed of.

COLERIDGE, J. The point here arises upon the examinations, and does not let in any question as to the propriety of the decision at sessions: but, if it did, I cannot see that any thing improper has been done, or that any thing was shown which ought to have set on foot an inquiry into the father's settlement. Must inquiry be made through all London, as to a birth which took place fifty or sixty years ago, upon a hearsay statement of a mere possibility? But here the evidence which is called for was the evidence of the appellants; and the magistrates might go on, and act upon the evidence of

the respondents, unless the appellants met it either by evidence produced at sessions, or by something on the face of the examinations.(a)

Order of sessions affirmed.(b)

(a) Wightman, J., was absent.

(b) The above decision, on the effect to be given to the mother's maiden settlement, was reconsidered and upheld by the court in *Regina v. The Inhabitants of Birmingham*, argued in Hilary term, 1846, and decided in the ensuing vacation, February 14th.

*THOMAS GRAHAM v. JESSE JACKSON. Jan. 24. [*811

In the manor of L. in Cumberland, the custom of tenure (called tenant-right) is that the freehold is in the lord, and the tenant holds of the lord, to him and his heirs for ever, according to the custom of the manor, at fixed rents and services. A fine is paid on every admittance. On alienation, a deed of bargain and sale is executed by the alienor to the alienee, which the alienor brings into court, whereupon the steward, by proclamation, calls upon any one to come forward who can say why the alienor shall not surrender into the hands of the lord; he then says to the alienor, "you surrender into the hands of the lord, to the use of the alienee, his heirs and assigns; are you content to make this surrender?" On the alienor assenting, the steward, by proclamation, calls on any one to come forward who can say why the alienee should not be admitted tenant. Then the steward says to the alienee, "In the name of the lord I admit you tenant, to hold to you, and your heirs and assigns, according to the custom." The jury then present the alienee as tenant on the alienation of the alienor, to hold to him, his heirs and assigns, according to the custom: the bargain and sale recites a license from the lord to alien, which, after the admittance, is endorsed on the deed of bargain and sale; the license is a matter of course, and a fixed sum is paid for it. When a married woman conveys, she and her husband execute the bargain and sale in court; the wife is then separately examined, and, after that, the proceedings go on as before stated: or the husband and wife may, out of court, execute the bargain and sale, and surrender, before the lord, his steward or deputy, who examines the wife separately. Surrenders out of court may be made by or to the parties themselves, or their attorneys: the surrender may be made to the lord himself, or his steward or deputy. In all cases the surrender is stated to be made to the lord: and the admittance afterwards may take place either in or out of court. The surrender and admittance are in all cases entered on the rolls.

A married woman, who before her marriage had been admitted as tenant, executed, jointly with her husband, out of court, a bargain and sale, being previously examined by the deputy steward. By the deed, the husband and wife "granted, bargained, sold, aliened, surrendered, set over and confirmed," (with the lord's license,) to the alienee, according to custom; then followed a clause, by which the husband and wife "do, and each of them doth, hereby severally and respectively ordain, constitute and appoint" J. "their and each of their several and respective attorney, for them, and in each or either of their several names," at the next or other court, to surrender into the hands of the lord according to the custom.

At a court, holden after the wife's death but in the life of the husband, J. surrendered to the lord; and the alienee was admitted. The entry was, that the husband and wife, by J., surrendered to the lord to the use of the alienee.

On a case stating the above facts, *Held*,

1. That the surrender to the lord was an essential part of the alienation; and that the bargain and sale, without such surrender, did not pass the estate.

Per Lord DENNAN, C. J. Especially as the case concluded by stating the question to be, whether the deed of bargain and sale, and the surrender and admittance, were sufficient, complete and valid, as against the heir,

2. That J., as attorney for the husband, had no power to surrender.

3. That, assuming J. to be lawfully constituted attorney for the wife, (and, per PATTESON, J., *semble*, he was not,) the power expired by her death, and the surrender was therefore void.

SPECIAL case.(a)

In the manor of Linstock, in the county of Cumberland, which is the property of the see of Carlisle, the custom of tenure is that termed tenant-

(a) It was understood that the case was drawn by an arbitrator.

right. The freehold of the customary tenements is in the lord. The
 *812] "tenant holds, to him and his heirs and assigns for ever, of the lord,
 according to the custom of the manor, under fixed customary rents,
 and performing certain customary duties and services, the tenements
 descending and being descendible from the ancestor to the heir, as of the
 hereditary right of the tenant, called tenant-right. A fine of a silver penny
 is paid on the admittance of every heir, purchaser or mortgagee.

On the alienation of customary lands and tenements within this manor, a
 deed of bargain and sale is executed by the parties, stamped with an ad
 valorem stamp. This deed of bargain and sale is in one form.

The alienor appears with this deed of bargain and sale in court. Proclama-
 tion is then made by the steward in the following words. "If any one can
 aught say why he" (the alienor) "should not surrender into the hands of
 the lord the customary tenements," (describing them as on the roll,) "let
 him come forward, and he shall be heard." The steward then says to the
 alienor, "You" (alienor) "surrender into the hands of the lord of this
 manor the premises," (specifying them as on the roll,) "to the use and
 behoof of," (the alienee,) "his heirs and assigns, according to the custom.
 Are you content to make this surrender?" The surrenderor (alienor) says
 "Yes." Proclamation is then made by the steward in the following words.
 "If any one can aught say why" (the alienee) "ought not to be admitted
 tenant of the premises surrendered to his use by," (the alienor,) "let him
 come forward, and he shall be heard." The alienee is then called up. The
 steward says: "In the name of the lord of this manor, I admit you tenant
 of all these premises," (describing them as in the roll,) "to hold to you
 and your heirs and assigns, according to the custom; and you are
 *813] admitted tenant accordingly." A memorandum is then made in
 the court paper of the day: "We present and find" C. D. "tenant, on
 the alienation of" A. B., "of all these premises," (describing them as on
 the roll,) "to hold to him, his heirs and assigns, according to the custom."
 The jury sign this paper. A form of this verdict paper was annexed to
 the case. The material parts were as follows.

"Manor of Linstock" } At a court leet and view of frankpledge, with a court baron,
 of the right reverend," &c., "held at," &c., "on," &c., (1st
 May, 1767.)

"The names of the jurors sworn," &c., (fourteen names:) "all sworn."
 "Which jurors, being all duly sworn, do say upon their oaths as followeth.

"We find Jane Reed, spinster, tenant by mortgage from William Sturdy
 and John Robinson, of all that the freehold lands in," &c., "of the yearly
 free rent of," &c.

* * * * *

"We find Thomas Little, of Derby, right heir to his father, Thomas
 Little, late of Brewstock, deceased, of all that his customary lands in
 Brewstock," &c., "they all being of the yearly customary and apportioned
 rent of 1s. 2d."

* * * * *

"We find Thomas Dalton, clerk, tenant, by purchase from Thomas Little, of Derby, of two closes," &c., "of the yearly apportioned rent of 1s. 2d."

The deed of bargain and sale recites a license from the lord to alienate: and, after the alienee has been admitted as above, the license of the lord to alienate is endorsed on the deed of bargain and sale as follows.

*"On behalf of the right reverend father in God, Hugh bishop of [814 Carlisle, I do hereby license and allow of the within deed, provided the same be no way prejudicial to the lord bishop, or his successors, lord of the said manor, with regard to the rents, fines, dues, duties and services accustomed for the within mentioned premises." If all the requisites of the custom have been complied with, the license is matter of course, for which 5s. 3d. is paid, although the deed may comprehend more than one copyhold tenement. There is no instance of a license being refused. The license generally bears date the day of the surrender and admittance.

The deed of bargain and sale is never mentioned or referred to on the rolls of the court in an alienation, excepting in case of mortgage; in which case it is referred to as follows. "To hold," &c., "subject to redemption by the said" A. B., "his heirs or assigns, on repayment by him to the said" C. D., "his executors, administrators or assigns, of the principal sum of" £—, (mentioning the mortgage money,) "with interest for the same after the rate and at a time mentioned in a certain indenture of customary bargain and sale, bearing date," &c., "made between," &c. "of the one part," and, &c. "of the other part."

Before the recent statute of wills, 7 W. 4, & 1 Vict. c. 26, lands in this manor were not devisable. In cases of a customary tenant wishing to dispose of his customary lands after death, he conveys to a third person, a trustee, in the same manner in every respect as upon an ordinary alienation. The trusts are declared by a separate instrument, which does not appear upon the court rolls. The trusts are generally declared to be in trust for the alienor during his life, and, after his death, "on trust to convey [815 to such persons, in such manner, as the alienor shall by deed or will appoint. The alienee, after the death of the alienor, makes another alienation in the ordinary customary manner, according to the trusts which had been declared by the separate instrument. Neither the lord nor his steward is informed of the trust, or that the alienation is in conformity with any trust.

When a married woman conveys customary lands of this manor of which the husband and wife are seised in right of the wife, she and her husband appear at the court, (when the surrender is in court,) and execute the deed of bargain and sale. The husband is then sent out, and the wife separately examined before the steward and the jury. After such examination, the husband comes in, and proclamation is made, and proceedings take place as before. When husband and wife surrender lands out of court, they

appear before the lord, his steward or deputy, out of court, and execute the deed of bargain and sale. The wife is separately examined by the lord, his steward, or deputy, as the case may be, and the surrender taken before the lord, his steward, or deputy, with the exception that there is no proclamation. There is no instance of a married woman surrendering lands within the manor by attorney.

Surrenders, and also admittances, by the custom of the manor, may be made out of court; and they may be made by or to the parties themselves, or their attorneys lawfully authorized. In case of alienation of these customary lands, as well by married women as by other persons, by the custom

*816] of the manor surrender may be made out of court, either to the lord himself, or to the steward, or to the deputy appointed by the steward. Where the surrender is made out of court, and the admittance in court, the deputation to the deputy steward and deed of bargain and sale are brought into court, at the court where the admittance takes place, and presented; and the surrenderee is admitted in the usual manner. There is only one instance before the present one of a surrender by husband and wife out of court before a deputy steward on the rolls; and that is in 1819. It is stated on the roll that the deputy had taken, in pursuance of the deputation, the separate examination of the married woman, and the surrender of husband and wife. That return was presented, and the surrenderee admitted. When both surrender and admittance are out of court, proceedings are the same as when the surrender and admittance are in court, excepting that there are no proclamations afterwards. The steward makes an entry thereof on the court rolls. Copies of some of such admittances were annexed to the case. The material parts were as follows.

* Manerium de Linstock. } Ad cur' baron et," &c., (held, 3d April, 1722, by the steward.)
 " Ad hanc curiam compertum est per homagium, et presentant, quod Willus Thomlinson et Josephus Nicholson cler. antehac, viz. 13. Sept. 1721, sursum reddidere in manus Dni Epi, secundum consuetudinem manerii predict', tota illa messuagia," &c., "ad opus et usum Jacobi Dunlop gen., et heredum suorum, secundum consuetudinem. Et modo ad hanc curiam venit dictus Jacobus Dunlop, et petit admitti tenens ad premissa predict. cum pertin', *secundum formam et effectum *817] surreditionis predict', habend' et tenend' sibi et heredibus, secundum consuetudinem maner' predict', per reddit' et servitia inde debit' et assuet'.

"Et solvit dno pro fine, secundum consuetudinem; et sic admissus est inde tenens."

* Manor of Linstock. } Be it remembered that, on," &c., (1st August, 1777,) ("no court being then held for the said manor,) came James Scott, William Andrew, and Jane his wife, (she being first solely and secretly examined, and consenting,) before the right reverend," &c., "lord of the said manor, at Rose Castle in the county of Cumberland, and surrendered

into his lordship's hands all that their messuage," &c., "within the said manor," &c., "to the use and behoof of John Stamper, clerk, and his heirs and assigns, according to the custom of the said manor; but upon condition of redemption by the said William Andrew and Jane his wife, their heirs or assigns, by the repayment of 240*l.* and interest for the same, at the end of one year, to the said John Stamper, his executors, administrators and assigns, as by deed indented, made or mentioned to be made between the said parties, and bearing equal date herewith, doth more fully and at large appear.

"And immediately, at the same time and place, came the said John Stamper, and humbly prayed to be admitted tenant of the said messuage," &c., "to which the lord consented: to have and to hold the said messuage," &c., "unto him, the said John Stamper, his heirs and assigns, according to the custom of the said *manor, by and under the payment of the said yearly rent and other dues, duties and services, [818 as accustomed. And he paid for a fine, as in the margin, and so was admitted tenant; but upon condition of redemption as aforesaid."

For every surrender and admittance there is a fee to the steward. Where the surrender is out of court and the admittance in court, a fee is payable on the surrender out of court, and a subsequent fee is payable on admittance for each separate tenement. A fine, termed a God's penny, viz. 6*d.* for each tenement, is paid on admittance. 1*s.* is paid for enrolling on the call roll of the manor, which is part of the court roll of the manor.

The earliest surrenders and admittances in existence are in 1692. From that time to 1731 they are kept in books, and are in the form annexed to the case. The material parts of this form were as follows.

"Maner^m de Linstock. } Ad cur' leet et vis' franc' pleg' dom' regis cum curia baron reverendi," &c., "dom' manerii predicti, tent' apud," &c., (2*d* April, 1695, before the steward.)

"Nomina juratorum," &c.

"Qui quidem juratores, jurati et onerati, sup' sacramenta sua dicunt et presentant: Imprimis," &c.

"Item juratores prædicti dicunt et psentant quod Ambrosius Nicolson, qui tenuit de dño secundum consuetudinem manerii unam domum mansionaliam," &c., "omnia prefata premissa concessit, bargainizavit et vendidit Jacobo Nicolson, ejus filio, per indentur' inter eos inde fact'," &c.

In the same roll is the following.

"Maner^m de Linstock. } *Ad cur' baron et dimissionum reverendi," &c., "domini manerii predicti, tent' apud," &c. (22*d* May, 1695, before the under-steward.) [819

"Ad hanc curiam venit Ambrosius Nicolson, gen., et sursum reddidit in manus dñi, per dictum senescallum suum, totam illam domum suam mansional',," &c., "ad opus et usũ Jacobi Nicolson (filii ipsius Ambrosii) et heredum, secundum consuetudinem (reservatâ occupatione privata et dote pro uxore et uxoris ipsius Ambrosii.)"

"Et ad hanc curiam venit dictus Jacobus Nicolson, et cepit de dicto domino, per subsenescallum suum predictum, ex surredditione dicti Ambrosii, omnia premissa predicta cum pertinen', et solvit finem, prout in margine, et admissus est inde tenens (sub conditione supradicta.)"

And, up to 1731, the presentments of the jury are entered or copies entered in the books. For the last fifty years the presentments are in the forms annexed to the case. The material parts are as follows.

"Manor of Linstock. } The adjourned court baron and customary court of the right reverend," &c., "held at," (13th November, 1829,) "by George Gill Mounsey, steward, before William Robinson and suitors." (Names of jurors.) "Who on their oaths present and find as follows.

"We present and find Thomas Wilson tenant, on the surrender of, and alienation of, George Thompson and John Wannop, of, in and to a customary dwelling-house," &c., "within and parcel of this manor, of the apportioned yearly customary rent of 4*l.*, subject nevertheless *820] such right and equity of redemption of the said John Wannop, his heirs and assigns, on repayment by him or them, to the said Thomas Wilson, his executors, administrators and assigns, of the principal sum of 400*l.* and interest, as is mentioned and contained in an indenture of bargain and sale, made and executed between the said parties, dated this day."

The roll of surrender and admittance is made by the steward, and does not contain reference to presentments.

On 1st November, 1839, Mary Elizabeth Graham, only daughter and heiress of James Graham, deceased, appearing at court in person, was admitted tenant of four customary tenements at Linstock, within and parcel of the said manor, and descending and descendible as aforesaid, and being the premises mentioned in the declaration, and whereof her father died seised according to the custom. (A copy of her admittance was annexed to the case.)

On 9th December, 1839, she executed a lease of the said customary tenements to Jesse Jackson, the defendant, to hold for the term of seven years, from 2d February, 1840, at the yearly rent of 70*l.*; by virtue of which lease the lessee entered, and remains in possession. (A copy of the lease was annexed.)

Shortly afterwards she intermarried with Mr. Bellas Moses.

On 4th February, 1841, Mrs. Moses being in imminent danger of death, the steward of the manor, at the request of the attorney for her and her husband, prepared and executed a deputation, empowering Edward

*821] Stewart Wilson, as his deputy steward of the manor, to "examine Mrs. Moses separately and apart from her husband, touching her free and voluntary assent to the surrender of her said customary estate to the use and behoof of Thomas Moses, his heirs and assigns, according to the custom of the manor. With this document, Mr. Wilson proceeded to Brampton, about 7 o'clock on that evening, and there took her separate examination and consent; and she, at the same time, executed a deed of

customary bargain and sale to Thomas Moses, his heirs and assigns, in the usual form. Mr. Wilson, at the same time, attested the signature of this deed by Mrs. Moses, and endorsed on the deputation his certificate of the execution thereof, and on the deed of bargain and sale, a memorandum of his having taken Mrs. Moses's separate examination, and of her having freely and voluntarily consented thereto. Copies of the deputation, and deed of customary bargain and sale, were annexed to the case. The material parts were as follows.

Deputation.

"Know all men by these presents that I, Robert Mounsey, of," &c., "steward of the manor of Linstock, in the county," &c., "have made, ordained, nominated, constituted and appointed, and by these presents do make," &c., "Edward Stewart Wilson, of," &c., "my deputy steward of the said manor, to examine Mary Elizabeth, the wife of Bellas Moses, of," &c., "separately and apart from the said Bellas Moses, her husband, touching her free and voluntary assent to the surrender of all that customary messuage," &c., "all which said premises are situated at Linstock, within and parcel of the said manor, of the yearly customary rent of 4s. to the use and behoof of Thomas Moses, his heirs and assigns for ever, according to the custom of the said manor; and further to do and [822 perform all and whatever shall be requisite and necessary to be done for the better executing and discharging of the power and authority hereby given. And I do hereby ratify and confirm all and whatsoever the said E. S. W., as such deputy steward as aforesaid, shall lawfully do or cause to be done in, about, touching or concerning the premises, by virtue of these presents, and require the said E. S. W. to certify the same upon these presents." (Signed and sealed by Mounsey.)

On this instrument Wilson endorsed a certificate, signed by himself, to the effect that, on 4th February, 1841, he had examined Mrs. Moses separately, and that she had freely and voluntarily consented to the surrender.

Bargain and sale.

"This inuenture made," &c., (4th February, 1841,) between Bellas Moses, of," &c., "and Mary Elizabeth, his wife, who is," &c., (reciting shortly her title to the premises,) "of the one part, and Thomas Moses, of," &c., "of the other part, witnesseth that, for and in consideration of the sum of 10s. of good," &c., "to the said Bellas Moses and M. E., his wife, in hand well and truly paid by the said Thomas Moses, at or before the sealing or delivery hereof, (the receipt whereof is hereby acknowledged,) and for other good and lawful causes and considerations thereunto moving, they, the said B. Moses and M. E., his wife, have, and each of them hath, granted, bargained, sold, aliened, surrendered, set over and confirmed, and by these presents do, and each of them doth, (by and with the license and consent of the right reverend father in God, Hugh, by Divine permission, Lord Bishop of Carlisle, lord of the manor of Linstock, in the county of Cumberland aforesaid,) grant, bargain, sell, alien, [823

surrender, set over, ratify and confirm, unto the said Thomas Moses, his heirs and assigns, all that their, or the one of their, several customary messuages," &c., "and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, use, trust, possession, property, benefit, claim and demand whatsoever, both at law and in equity, of them the said Bellas Moses and Mary Elizabeth, his wife, or either of them, of, in or to the said premises, or any part thereof, and also all deeds," &c.; "to have and to hold all and singular the said messuages," &c., "hereby granted and surrendered, or intended so to be, with their and every of their appurtenances, unto the said Thomas Moses, his heirs and assigns, to the only proper use and behoof of the said Thomas Moses, his heirs and assigns for ever, according to the custom of the said manor of Linstock, yielding and paying therefore, unto the said lord of the said manor and his successors, the said several yearly customary rents, (making together the sum of 18s. 1d.,) at the days and times accustomed for payment thereof, and paying, doing and performing all such other fines, dues, duties and services therefore due and of right accustomed. And the said B. Moses and M. E. his wife do, and each of them doth, hereby severally and respectively ordain, constitute and appoint Thomas James, of," &c., "their and each of their several and respective attorney, for them, and in each or either of their several names, at the next court, or at any other court, to be holden for the said manor of Linstock, or before the lord *824] of the said manor, his steward, deputy steward or other person competent in this behalf, and to surrender the before mentioned customary hereditaments and premises, with the appurtenances, into the hands of the lord of the said manor or his steward, according to the custom of the said manor, to the use and behoof of him the said Thomas Moses, his heirs and assigns for ever. In witness," &c. (Signed and sealed by the husband and wife.)

On this was a memorandum, signed by Wilson, to the effect that Mrs. Moses had been separately examined by him, had freely and voluntarily consented to the indenture, and had executed it in his presence.

A special court for the manor was on the same 4th day of February summoned to be held on the next day, within the manor. And accordingly, on the morning of 5th February, Mr. Wilson proceeded to hold it. Mr. James, solicitor, appeared with the deed of customary bargain and sale which had been executed the preceding evening, before the death of Mrs. Moses, in which is contained the power of attorney from Mr. and Mrs. Moses, authorizing him to appear at court, and for them to surrender the customary premises into the hands of the lord, according to the custom, to the use of Thomas Moses, his heirs and assigns for ever. The usual formalities being gone through, and the deputation and return being exhibited to the jury, Mr. James, claiming to act as attorney for Mr. and Mrs. Moses, as constituted by the deed, made a formal surrender for them accordingly, stating at the time that he did so in confirmation of what had been done

the previous evening. And, Thomas Moses being thereupon admitted tenant in person, the jury made and signed their presentment of alienation. A copy was annexed to the case; the material parts were as follows.

“Manor of Linstock.” } *The special court baron and customary court of the
 } honourable and right reverend,” &c., “lord of the said [825,
 } manor, held at,” &c., (5th February, 1841, by E. S. Wilson,
 the deputy steward.)

“At this court came Bellas Moses, of,” &c., “and Mary Elizabeth, his wife, by Thomas James, their attorney, duly constituted by letter of attorney under their hands and seals, (the said Mary Elizabeth having been first separately examined apart from her said husband, by virtue of a deputation under the hand and seal of Robert Mounsey, Esquire, chief steward of this manor, as appears by the said deputation and return thereto, now produced in court, and freely and voluntarily consenting,) and surrendered into the hands of the lord, by his said deputy steward, all that customary messuage,” &c. “All which said premises are situated at Linstock, within and parcel of the said manor, of the yearly customary rent of 4s., and other dues, duties and services. To the use and behoof of Thomas Moses, his heirs and assigns, for ever, according to the custom of the said manor.

“And, at the same court, came the said Thomas Moses, and humbly prayed to be admitted tenant of the premises, to which the lord consented by his said deputy steward, to have and to hold the premises aforesaid, with the appurtenances, unto the said T. M., his heirs and assigns, according to the custom of the said manor. And the said T. M., having paid his fines on his admittance, as in the margin, is thereupon admitted tenant.”

At the time when this was done, Mrs. Moses had been dead some hours. She died during the preceding night.

*Thomas Moses, by deed of even date with the above mentioned deed of customary bargain and sale to him, but not executed until [826 5th February, declared the trusts thereof; and has, since the death of Mrs. Moses, reconveyed, in the customary form, the premises to Mr. Bellas Moses, who was duly admitted tenant thereof in open court, on 30th April, 1841. (A copy of the deed was annexed to the case.)

The customary heir at law of Mrs. Moses, on her death, is Mr. Thomas Graham, her paternal uncle; who now contends that Mrs. Moses died seised of the customary tenement, according to the custom of the manor; that, by her death, her power of attorney was at an end, and consequently the surrender made in her name under that power of attorney by Mr. James, is a nullity, and that the estate descended to him as her heir; and also that, in case the alienation to Thomas Moses be held good, yet that, being without valuable consideration, it enures to the use of the heir.

Mr. Bellas Moses contends that the alienation by Mrs. Moses to Thomas Moses is good, by reason of her having been duly examined, and having voluntarily assented to the surrender, and by her having executed the deed of bargain and sale; that she did all that was requisite on her part; and

that the formality of the surrender in court, next day, by ~~cr~~ attorney, ~~was~~ not an essential part of the transaction, the deed of bargain and sale and examination of the previous day being sufficient to pass the estate.

The action is brought by Mr. Graham for recovery of a half year's rent of the estate due at Lammas, (1st August, 1841.)

*827] If the deed of bargain and sale, and the surrender and admittance, were not sufficient as against the heir, judgment must be for the plaintiff. If they were complete and valid then for the defendant.

Joseph Addison for the plaintiff.

First, Mrs. Moses, being a married woman, could not legally give a power of attorney to make this surrender. That is so upon general principles of law. In *Oulds v. Sansom*, 3 Taun. 261, (a) it was held that a feme covert could not appear by attorney as demandant in a writ of right. Even if a power so granted could operate upon personality, it could not upon realty. The inability of a feme covert to plead by attorney is alluded to in note (1) to *Forrester v. Tremaine*, 2 Wms. Saund. 209 b, 6th ed. A special power is given to femes covert, by stat. 11 G. 4, & 1 W. 4, c. 65, s. 4, to appoint an attorney, by deed, to take an admittance; which shows the general inability at common law. It will probably be contended that the act of a feme covert becomes valid by the co-operation of the husband, which took place here. But that rule, if true to any extent, cannot be so in the case of real property. Where a joint act is to be done by the two, perhaps they may jointly appoint an attorney; but the surrender of the wife's copyhold land is an act in which properly the husband has no share. He merely assents; he has no interest to part with; he has a mere possession of the wife's copyhold; *Compton v. Collinson*, 1 H. Bl. 334, 342. The very necessity of a separate examination shows that the husband's act cannot pass the estate. But, further, it is stated in the present case that there is no instance in this manor of a married woman surrendering by attorney; *828] and a conveyance of customary property derives its validity entirely from the custom.

Secondly, the power, even if good, ought to have been executed during the life of the grantor: by her death it expired. Littleton, sect. 66, lays this down as to a power of attorney in a deed of feoffment. The same rule applies where a power of attorney to enter up judgment is granted for a valuable consideration, and the grantee dies; and this though it contain a release of errors to the grantee, his executors or administrators; *Short v. Coglin*, 1 Anst. 225. This rule has also been applied where the grantor of the power has died; *Heath v. Brindley*, 2 A. & E. 365; and *Watson v. King*, 4 Camp. 272, is to the same effect. In *Gee v. Lane*, 15 East, 592, it was held that, if two parties give a joint warrant of attorney to enter up judgment against the two, judgment cannot be entered up against one after the death of the other. On the death of Mrs. Moses the estate was absolutely in her heir.

(a, See *Panton v. Williams*, 2 Q. B. note (a), p. 179.

Thirdly, the bargain and sale of 4th February, 1341, without the surrender, did not pass the customary estate. It has been said that tenures of this sort are in the nature of freehold rather than copyhold; but it is now considered the better opinion that they are a superior sort of copyhold; only the holding is not at the will of the lord. [Lord DENMAN, C. J. And the case states the freehold to be in the lord.] Blackstone, in his Considerations on Copyholders,(a) comes to the conclusion that such estates, being held by copy of *court roll, are not freehold: and Hargrave assents to this; note (1) to Co. Lit. 59 b. Lord ELLENBOROUGH [*829 takes the same view in *Doe dem. Cook v. Danvers*, 7 East, 299, 321. The bargain and sale could not transfer the lord's freehold: and it could not operate as a release; for the alienee had no interest: it was a mere declaration of an intent to surrender. The language of the deed itself shows that the surrender to the lord was contemplated as the operative part of the conveyance: otherwise, why should there be a power to surrender to him at all? The custom authorizes no such transfer as a mere bargain and sale. The wife therefore was the tenant, and would remain so until another was admitted; *Payne v. Barker*, O. Bridgman, 18, 21, 23;(b) *Doe dem. Toftfield v. Toftfield*, 11 East, 246; 1 Watkins on Copyholds, 248. The rule on this subject was assumed by the court in *Doe dem. Bennington v. Hall*, 16 East, 208.

Cowling, contra. First, there is a general custom to-surrender by attorney; that will extend to a surrender by a feme covert, unless there be a general absolute principle of law prohibiting this. The mere accident that no married woman has acted under the custom is unimportant. A feme covert has, generally, a power to convey her copyhold. In *Compton v. Collinson*, 1 H. Bl. 344, Lord LOUGHBOROUGH, in delivering the judgment of the court, described her general rights as follows. "It was objected in the argument, that no custom is stated in the case, and that a surrender by a feme covert even with the husband's joining, can in no case be good but *by the particular custom of a manor. No authority was cited for this position, but it was argued that from the several cases, viz. [*830 3 Dyer, 363 b, pl. 26; *Erish v. Rives*, Cro. Eliz. 717; and *Anonymous*, Litt. R. 274, (in which the validity of a custom for a feme covert being separately examined, and her husband joining, to make a surrender, is affirmed,) it was strongly implied that such a surrender would not be good by the general law of copyholds. This objection rests on a supposed defect in the statement of the case. But the court will intend that the surrender by the wife separately examined with the husband joining, would have been good. The case could not otherwise have been made, and even if the argument had been upon a special verdict, the objection would not prevail. For it would be contrary both to law and reason, that the copyhold of a woman should become unalienable by her marriage, and it is

(a) Tracts chiefly relating to the antiquities and laws of England, p. 199, (3d ed.)

(b) See *Rea v. Dame St. John Mildmay*, 5 B. & Ad. 254.

against the nature of copyhold estates that they should not be surrendered back to the lord, by the act of all the persons having any interest in them, and having a disposing power." It follows that a feme covert has generally a power to surrender; and then, the custom of this manor being that a surrender may be made by attorney, it follows that she may surrender by attorney. It is unimportant whether she could by herself appoint the attorney. When husband and wife sue together, the husband makes an attorney for both; *Foxwist v. Tremaine*, 2 Saund. 212, 213. [PATTESON, J. The husband there might appoint without the wife's consent; can he convey the wife's land by attorney without her assent? Suppose in the separate examination she declared her dissent from the conveyance.] That *831] *would render the conveyance inoperative, though the character of the attorney might perhaps be created without her consent. In *Com. Dig. Baron and Feme*, (G 4,) it is said: "a surrender of a copyhold by husband and wife, the wife being examined by the steward, binds the wife." Her assent should be by deed; note (9) to *Wotton v. Hele*, 2 Wms. Saund. 180 a. *Oulds v. Sansom*, 3 Taun. 261, decides only that a feme covert cannot appear alone by attorney appointed by herself; and no more appears from note (1) to *Foxwist v. Tremaine*, 2 Wms. Saund. 209 b, which has been referred to. The utmost that can be inferred from sect. 4 of stat. 11 G. 4, & 1 W. 4, c. 65, is that a feme covert could not, at common law, have appointed an attorney to take an admittance without her husband's assent. [PATTESON, J. The husband and wife, in the deed now before us, "severally and respectively" appoint "their and each of their several and respective attorney, for them, and in each or either of their several names," &c. The husband does not appoint an attorney for the wife.]

Secondly, the power did not expire by the wife's death. It derived its validity exclusively from the husband. Sect. 66 of Littleton, and the other authorities which have been cited, apply only to the case of the death of the party, or of one of several parties, from whom the power emanates. [WIGHTMAN, J. For whom did the attorney act?] For the husband. [WIGHTMAN, J. Could the husband alone surrender?] Generally a husband cannot alone dispose of the wife's copyhold; but here the deed was the joint act of the two.

Thirdly, the deed was sufficient to pass the estate, *without a sur- *832] render in the lifetime of the wife. In *Doe dem. The Earl of Carlisle v. Towns*, 2 B. & Ad. 585, 590, LITTLEDALE, J., spoke of a customary tenure as follows. "The tenure in these manors is peculiar. It is not to hold merely according to the custom of the manor, as is generally the case with such estates in the north of England, but at the will of the lord, according to the custom of the manor; it is a customary estate of inheritance at will; it is alienated by customary bargain and sale, with the license of the lord endorsed; and it passes by the deed only, without admittance. At the courts, which are held twice a year, proclamation is made for heirs or alienees to appear, and their names are then enrolled; but this is not an

admittance, it is only a notification of the change of tenants. In case of alienation, the title is complete on execution of the bargain and sale, and license from the lord; and where the lands pass by descent, they vest in the same manner as freehold property." Here, where the holding is not at the will of the lord, the surrender appears to be still less important. It is true that these tenures are rather of the nature of copyhold than freehold. Still the court will notice that the essential part of the transaction is not the surrender, but the conveyance by bargain and sale, which, indeed, must be afterwards notified to the lord and enrolled. That last, however, is a formality which may well be gone through after the death of the bargainer. There can be little doubt that anciently the lord's license was an essential part of the transaction; now it has become a mere form; the surrender can be no more. In *Doe dem. The Earl of Carlisle v. Towns*, 2 B. & Ad. 589, LITTLEDALE, J., observed: "There can be no new grant in *this manor. The lord never grants at all; the property always remains in [833 him, as a kind of perpetual trustee." [WIGHTMAN, J. In that manor there was no surrender at all.] In the ordinary legal sense of surrender, there is no surrender here. On the face of the deed, the husband and wife grant, bargain, sell, alien and surrender to Thomas Moses, not to the lord. It very much resembles a bargain and sale at common law; the lord is a kind of trustee, as LITTLEDALE, J., expresses it. [WIGHTMAN, J. The power of attorney is for a surrender into the hands of the lord, according to the custom.] The deed will take effect independently of that clause, which is unnecessary if the argument for the defendant be well founded. The proceeding in court is merely a notice given to the lord in order that the new tenant may be placed on the roll. The ceremony, which the case describes, does not correspond in its details with the ordinary forms, as described in 1 Scriven, Cop. 125, 4th ed. There is no symbolical delivery by the rod. [LORD DENMAN, C. J. That is peculiar to one species of tenancy, by the verge.] There is ordinarily a symbolical act, as appears by the precedents in the appendix to Scriven, vol. 2, p. 757, &c. 4th ed. Here, too, is no regrant, in the proper sense of the word. The jury find the fact that the alienee is tenant. [COLERIDGE, J. After the admittance.] The jury present no surrender. [COLERIDGE, J. Why should they present a surrender which takes place in court? PATTESON, J. The form used at the court is that the husband and his wife, by their attorney, surrender into the hands of the lord; and the old form of admittance has the words "sursum reddidit *in manus domini." The words of surrender to the alienee must have [834 crept into the later deeds of bargain and sale by mistake. The bargain and sale presented in 1695 has no such expression. In the early entries the bargain and sale is notified on the rolls. In later times, the bargain and sale seem not to be presented so distinctly.] In 1 Scriv. Cop. 283, 4th ed., it is said: "The act of admittance to copyholds is to be distinguished from the mere voluntary grant of the lord, and where the right of alienation is established by the custom of the manor, the admittance is more of form than of

essence, and the surrender is deemed to be the substantial part of the conveyance." The author then refers to *Doe dem. The Earl of Carlisle v. Towns*, 2 B. & Ad. 585, and points out that the land there, when conveyed by customary bargain and sale, passed by the deed, though the tenants were bound to appear. The admittance, properly so called, should be symbolical: 1 Scriv. Cop. 285, 4th ed. The surrender and admittance therefore resemble the enrolment of a bargain and sale, which may take place at any time, even after the death of the bargainee; *Dinmock's Case*, Hob. 136, 5th ed.; or of the bargainor; 1 Bac. Abr. 688, *Bargain and Sale*, (E 1,) 7th ed. The court will notice the peculiar nature of those tenures; per CHAMBRE, J., in *Burrell v. Dodd*, 3 B. & P. 378, 381. [PATTESON, J. In *Bingham v. Woodgate*, 1 Russ. & M. 32,(a) Sir JOHN LEACH, M. R., held, that where a customary tenure required a bargain and sale, as well as a surrender and admittance, the freehold was in the tenant. That shows, at least, that all may be an essential part of a custom, even though

the freehold is in the tenant. The *surrender and admittance seem
 *835] to be no more, in such a case, than a remnant of villenage.] In the Third Report of the Commissioners on Real Property, p. 20, Fol. 1832, this customary tenure is thus described. "It is a base tenure, partaking, to a considerable degree, of the nature of copyhold; but the holding is, generally, declared to be according to the custom of the manor, without being at the will of the lord; and, not unfrequently, instead of a surrender in court by the tenant in person, or by attorney, alienation is allowed by a common-law conveyance, which is presented at the lord's court, and enrolled, whereupon the grantee is admitted, and becomes the tenant on the roll; but it is in the tenant on the roll, or his heir, that the legal estate always resides." Lord ELLENBOROUGH, in *Doe dem. Reay v. Huntington*, 4 East, 271, 288, described these tenures as follows. "These customary estates, known by the denomination of tenant-right, are peculiar to the northern parts of England, in which border-services against Scotland were anciently performed, before the union of England and Scotland under the same sovereign. And although these appear to have many qualities and incidents which do not properly and ordinarily belong to villenage tenure either pure or privileged, (and out of one or other of these species of villenage all copyhold is derived,) and also have some which savour more of military tenure by escuage uncertain, which, according to Littleton, sect. 99, is knight's service; and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing
 this species of tenure, viz. the being holden at the will of the *lord,
 *836] and also the usual evidence of title by copy of court roll, and are alienable also, contrary to the usual mode by which copyholds are aliened, viz. by deed and admittance thereon, (if indeed they could be immemorably aliened at all by the particular species of deed stated in the case, viz. a bargain and sale, which at common law could only have transferred the

(a) See ib. p. 750. Also 2 Scriv. Cop. 577, 4th ed.

use;) I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in courts of law that these customary tenant-right estates are not freehold, but that they in effect fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question."

Joseph Addison in reply. The husband does not profess to appoint the attorney for the wife. But the act to be done by the attorney was for the wife only. The surrender cannot be dispensed with. The bargain and sale does not appear on the roll; and the alienee is practically tenant by copy of court roll, to which tenure surrender and admittance are essential. In *Doe dem. The Earl of Carlisle v. Towns*, 2 B. & Ad. 585, it was otherwise: there no surrender at all took place by the custom. [WIGHTMAN, J. The case here says that surrenders may be made by or to the parties themselves.] That must refer to the deed, inaccurately called a surrender: the statement is explained by what follows, which shows the necessity of some surrender to the lord. That this is the efficient surrender appears by what passes when the surrender is made in court: the question is then asked whether any one can say aught why the alienor should not surrender into the hands of the lord; and *the alienor is asked whether he surrenders into the hands of the lord. The bargainee could not have [*837 alienated before surrender. The enrolment of a bargain and sale is the mere act of the officer. The case itself, by the question at the end, treats the surrender as necessary, and leaves to the court only the question whether, in this instance, the bargain and sale and the surrender and admittance are sufficient.

Lord DENMAN, C. J. It appears to me that at last the question which we have to determine is one of fact, rather than of law. And, as to that, we must notice that the language of the case assumes the surrender and admittance to be necessary. The question put is, whether the surrender and admittance here, together with the bargain and sale, are sufficient. It is true that the husband is represented as contending that he is entitled to succeed on a narrower ground, namely the sufficiency of the bargain and sale by itself; but the conclusion of the case gives this point up. Therefore all question as to the effect of the deed taken by itself is got over, since the arbitrator has made up his mind that the surrender is, in fact, necessary. Then the surrender under these circumstances was clearly insufficient. It is too plain for argument, that the power of attorney granted by Mrs. Moses expired upon her death. Other questions arise upon this power of attorney; but the fact of its revocation is so clear that the discussion becomes unnecessary. On this short ground, I am of opinion that the plaintiff is entitled to our judgment.

PATTESON, J. I am entirely of opinion that the plaintiff is entitled to recover. The first question is, whether estates *pass, in this manor, by the mere execution of a bargain and sale, so that all which fol- [*838 lows is a mere notice to the lord, and not essential to the transfer of the

estate. Certainly the case does not find in terms that a surrender is necessary: but we cannot fail to see that it is so, when we take the whole case together. The old entries are better authorities on this point than the modern. In the entry of 1695, and that of 1722, the alienors are stated to have surrendered into the hands of the lord: and that is the language also of the more modern entries. Can we treat that as a mere notification to the lord? Or is it not that which gives effect to the bargain and sale? I may refer to *Bingham v. Woodgate*, 1 Russ. & M. 32,(a) merely for the purpose of remarking that it was there taken for granted by the master of the rolls that a surrender and admittance may be necessary where a bargain and sale is necessary. *Doe dem. The Earl of Carlisle v. Towns*, 2 B. & Ad. 585, is really a very different case. The question there was, whether a stamp on the enrolment was necessary, under stat. 55 G. 3, c. 184, which, (by Sched. Part I. tit. *Copyhold*,) requires such a stamp in the case only of "copyhold estates; and customary estates, passing by surrender and admittance, or by admittance only, and not by deed;" and the court held that the stamp was not necessary. But there the case expressly found that the estates passed by customary conveyance of bargain and sale, with the lord's license endorsed: the enrolment there was, therefore, nothing more than a notification of a conveyance. In the course of the argument there a question was suggested, whether two stamps would be necessary in a case like the present. I myself do not *see much difficulty in that

*839] question. The act imposes the stamp where the estate passes by surrender and admittance, and not by deed; whereas here the estate passes by deed, as well as by the surrender and admittance. But that point we need not now decide. For the reasons given I am of opinion that Mr. *Cowling* has failed to show that the estate passed by the bargain and sale before the death of the married woman. He would be bound, on this part of the case, to go the length of contending that, under this bargain and sale, with the power of attorney, the alienee could be admitted after the death of both husband and wife. Next comes the question, whether the death of the wife revoked the power of attorney, supposing it to have been ever good. I would not say that it ever was good: I do not think it was. That a husband, either with or without his wife's consent, can appoint an attorney to convey away her estate, is what I have yet to learn. But, again, he does not profess to do so, even giving the greatest latitude to the words used. Even if the grant of the power be joint and several, (and I think it is not joint at all,) still it does not profess to appoint an attorney for the wife; and, as far as the custom can be collected from the case, her own power to create an attorney for this purpose is negatived. The power of attorney is good for nothing in its inception. But, even if it was ever good, the death of the wife put an end to it. Her death determines, not only her own power, but even the interest of the husband in the estate. The transaction is wrong in every way. All might have been done without difficulty

(a) And see *ib.* p. 756.

I cannot think why, when the deputy steward was appointed, they did not make him take the surrender out of court.

*COLERIDGE, J. The question is, whether, at the time of the wife's death, there remained any thing to be done: for her death clearly [*840] revoked the power. It is said, indeed, that the power is in effect granted by the husband, and therefore remained good while he lived: but, supposing him to have joined for the purpose of enabling her to act, still that is done with reference to her interest exclusively, which ends with her death; so that it is the same thing as if she, being a feme sole, had executed alone. It comes, therefore, back to the question, whether, at the time of her death, any thing remained to be done. The case presents a little ambiguity: and the law and the fact are not kept so entirely separate as might be wished. First, the freehold is always in the lord; that is very important. Secondly, there must be a surrender; which cannot be merely for the purpose of notice. The words in the entries referred to by my brother PATTESON, are very important as to this. Then what follows must be taken to be in the nature of a request by the alienor. He is asked whether he surrenders, and he answers that he does: the tenants are then asked whether there is any objection to his surrendering: after which, no objection being made, the steward, in the name of the lord, admits the tenant. The statement in the case, that surrenders out of court may be made to the parties themselves, is apparently inconsistent with what follows: but I think we must treat it as a general statement to be explained by those afterwards added. Mr. *Cowling* refers to the words of the deed, as showing that the alienor surrenders to the alienee. To this there are two answers. First, the deed, according to the finding of the case, must be a bargain and sale. The case does not find that the deed must itself act as a surrender: and, taking the whole together, we must limit the effect of that [*841] word, and consider it to refer merely to the bargain and sale. Secondly, it is not unimportant that a power of attorney follows, authorizing a surrender from the wife: if she had already surrendered, that would be unmeaning. I think, therefore, that there is no importance in the word "surrender" in the deed, and that the effective part of the conveyance in this manor is the surrender.

WIGHTMAN, J. I am of opinion that a surrender to the lord is necessary here, and has not been made. As to the latter proposition, even if the wife could make a power of attorney, it was revoked by her death, and there was nothing for the power to act upon. And, as to the surrender, I think the custom, as set out, shows that a surrender and admittance, as well as bargain and sale, were necessary, as in *Bingham v. Woodgate*, 1 Russ. & M. 32. Some ambiguity is created by expressions in the case, from which it might be inferred that a surrender out of court might be made to the alienee. These expressions, however, are qualified by what follows; that, by the custom of the manor, the surrender out of court may be taken by the steward or his deputy. So that it appears that what the parties can

effect between themselves is merely the bargain and sale, which ~~must be~~ followed by a surrender and admittance. The whole may be done out of court except the proclamations. Here, too, it is important that the deed contains, besides the surrender to the alienee, a power of attorney to surrender *according to the custom of the manor. I think, therefore,

*842] that the custom has not been complied with.

Judgment for plaintiff.

The QUEEN v. The Inhabitants of ST. LAWRENCE in APPLEBY.

Jan. 25.

In stat. 6 G. 4, c. 57, s. 2, the words "separate and distinct," apply to "dwelling-house and building," but not to "land."

Therefore a settlement may be gained under that clause by one of two persons holding land jointly at a rent of 76*l.* paid by them in equal proportions, if the renting be in all other respects conformable to the statute.

On appeal against an order of two justices, removing Mary, widow of George Liddle, and her five children from the township of Pollards-lands, in the county of Durham, to the parish of St. Lawrence in Appleby, in the county of Westmoreland, the sessions confirmed the order, subject to the opinion of this court on a special case.

The case set forth the examination of Robert Spence, step-father to the pauper's late husband, the material part of which was as follows. "On the 1st day of February, 1829, by a certain lease dated on that day, and made between John Blenkarn Sedgwick of the one part, and me the said Robert Spence and the said George Liddle of the other part, the said J. B. Sedgwick demised and let to us, the said R. S. and G. L. deceased, a certain farm, consisting of a separate and distinct dwelling-house, and about seventy acres of land, be the same more or less, situate at Hoff in the parish of St. Lawrence in the county of Westmoreland, for the terms of three years, three years and one year, at and for the rent or sum of 76*l.* for the first term of three years, and at and for the rent or sum of 80*l.* for the next terms of three years and one year. In pursuance of the said lease we, the

*843] said R. S. and the said G. L. deceased, on *or about the 2d day of February then next ensuing, entered into the possession and occupation of the tillage land of the said farm, and, on or about the 25th day of March then next ensuing, entered into the possession and occupation of the grass and herbage land of the said farm, and on or about the 6th day of April then next ensuing entered into the possession and occupation of the dwelling-house and buildings of the said farm, and continued to rent and occupy the same respectively for the first term of three years from the commencement thereof then next following at the rent mentioned in the said lease, when we gave up the possession thereof." The case then stated a residence by Liddle in the appellant parish during each year of

renting. "The dwelling-house upon the said farm was necessary for the proper cultivation thereof, and was hired and rented by us for that purpose, and was worth about 16*l.* a year; and the land belonging thereto, independently of such dwelling-house, was well worth 60*l.* a year. I and the said G. Liddle, during each of the said three first years that we so rented and occupied the said farm, paid the said yearly rent of 76*l.* for the same in equal proportions; and the said G. Liddle, in each and every of the said three first years, paid rent for the land which he so occupied jointly with me, independently of the said dwelling-house thereon, to the amount of 30*l.*"

The case stated that, on the trial of the appeal, evidence was given of the material facts above set forth. The question reserved for the opinion of the court was, whether or not G. Liddle gained a settlement in the appellant parish under the renting and occupation above mentioned.

**W. H. Watson*, in support of the order of sessions, was stopped [*844 by the court.

Archbold, contra. The settlement is claimed under stat. 6 G. 4, c. 57, s. 2; but that clause enacts that no person shall become settled by renting a tenement "unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person," &c., "nor unless such house or building, or land, shall be occupied under such yearly hiring," &c.; the word "occupied" being applied to the two subject matters of "house or building" and "land," without any thing to intimate a difference in the manner of occupation. The words "separate and distinct" must be applied to "land" as well as to dwelling-house or building; and a joint occupation of either will not suffice. The statute is remedial; and such a statute must be construed liberally, to "suppress the mischief and advance the remedy:" *Heyton's Case*, 3 Rep. 7 a, 7 b. This principle of construction was acted upon in *Rex v. Threlkeld*, 4 B. & Ad. 229. [Lord DENMAN, C. J. What do you say is the mischief to be remedied by this act?] The disputes which had previously arisen as to settlement by renting of tenements, particularly in cases of joint occupation. The beneficial object was pointed out in the preamble to stat. 59 G. 3, c. 50, and is more completely carried into effect by stat. 6 G. 4, c. 57. [COLERIDGE, J. The questions which the act of 6 G. 4, professes to remove are those created by the endeavour to make settlements depend upon the annual value instead of the rent paid.]

*Lord DENMAN, C. J. The framers of the statute have studiously avoided saying what you would make them say. The order of sessions must be confirmed. [*845

PATTESON, J., concurred.

COLERIDGE, J. It would be very difficult to construe the statute as if the words were "consist of a separate and distinct dwelling-house or building, or of separate and distinct land."

WIGHTMAN, J., concurred.

Order of sessions confirmed.

In the Matter of Arbitration between HENRY PLEWS and WILLIAM MIDDLETON. *Jun. 29.*

Unprofessional arbitrators, appointed by an agreement of reference, ascertained, at a meeting, the balance due from A., one of the litigant parties, to B., the other, except a few pounds, which the arbitrators proposed to make payable by A. to B., on account of interest owing by A. to a third person, R., on a mortgage of land, the property of A., which A. was to assign to B. By arrangement between themselves, the arbitrators, without holding any further meeting, questioned R. separately, and in the absence of the parties, as to the amount of interest due; each then stated the result of his inquiry to the other, and, the reports agreeing, they made their award.

The court set the award aside on motion, as procured by "undue means," contrary to stat. 9 & 10 W. 3, c. 16, s. 2, the course pursued having been inconsistent with natural justice.

An agreement of reference contained a clause for making such agreement a rule of court. The award being published, and a motion about to be made for setting it aside, the party interested in opposing such motion refused to produce the agreement for the purpose of its being made a rule. The court, on motion in the term next after the making of the award, permitted a copy of the agreement to be made a rule of court, and granted thereupon a rule nisi for setting the award aside.

Gosdon, in last Michaelmas term, obtained a rule to show cause why the award made in this case, (dated June 13th, 1844,) should not be set aside on the grounds after stated. The material facts were as follows.

*846] *Disputes having arisen between Plews, a maltster and brewer, and William Middleton, an innkeeper, respecting certain amounts and money transactions, and certain securities given by W. Middleton to Plews on premises of W. Middleton, they, by agreement, referred the matters in difference to George Dodsworth, architect, and Christopher Middleton, mason, (arbitrators nominated one for each party,) with power to them to appoint a third; which they did. The agreement stipulated that the parties and each of them should and would produce and deposit with the arbitrators all books, accounts, &c., relative to the premises in question, in their respective possession and power: and that each of them should and would submit to be examined upon oath. The arbitrators and the umpire, John Fawcett, mason, met, May 15th, 1844, and proceeded on the reference. Plews attended by attorney; but W. Middleton appeared only in person. Plews was called into the room (a private one in W. Middleton's house) in which the arbitrators and umpire sat; and they examined, with him, and compared with his books, the accounts between himself and W. Middleton. Plews, and other witnesses on his side, were examined without being sworn. W. Middleton was twice called into the room to answer questions, but was not present on either occasion more than two minutes, and was out of the room during all the rest of the proceedings. By the affidavits on his part it appeared that he was excluded; but the affidavits on the other side contradicted this. The arbitrators and umpire were satisfied with the accounts. A balance appeared due from W. Middleton to Plews, and the referees were of opinion that Plews should take, in satisfaction of this balance, certain premises of W. Middleton *already mortgaged

*847] by him to Plews, and should pay off a debt of 300*l.* and interest.

secured by mortgage on the same property to Elizabeth Raper, who had been in receipt of the rents and profits.

The affidavits in support of the rule stated that, the referees being unable at this meeting to ascertain the amount of interest due to Elizabeth Raper, it was determined that they should meet again for the purpose of settling that amount, and upon other matters connected with the arbitration, and for the purpose of finally determining upon the award; but that the meeting was postponed on account of Dodsworth's inability to attend. That Christopher Middleton, the arbitrator on W. Middleton's part, was informed of this on June 1st, and no further communication was made to him till June 13th, when G. Dodsworth, the arbitrator on Plews's part, and Ramshay, Plews's attorney, produced to Ch. Middleton for his execution the award, already drawn up and signed by Dodsworth and the umpire. That, on Ch. Middleton complaining that a second meeting had not been held, they told him that they had considered it unnecessary, as Dodsworth had himself called on Miss Raper, examined her rent and interest account, and ascertained that a balance of 12*l.* 13*s.* 6*d.* was due to her for interest on the 300*l.* mortgage. Christopher Middleton deposed that he, being satisfied by Dodsworth and Ramshay of the correctness of this statement, executed the award. It was made conformably to the arrangement above stated, and ordered W. Middleton to convey his interest in the mortgaged estates to Plews, and to pay Plews 134*l.* 6*s.* 8*d.*, stated to be the balance due from W. Middleton to Plews, "including the said mortgage of the said E. Raper;" and which sum was composed partly of the 12*l.* 13*s.* 6*d.* found due to Miss Raper for interest.

*The affidavits in opposition to the rule denied that, on May 15th, it was agreed that any further meeting should be held. And they [*848 stated that, at the meeting of May 15th, the balance due from W. Middleton to Plews was ascertained to be 121*l.* 13*s.* 2*d.*, exclusive of the interest owing to Miss Raper, and it was agreed that Christopher Middleton and the umpire should call upon Miss Raper that evening and ascertain the amount of interest from her accounts, and that Dodsworth should, at another time, ascertain it in the same manner for his own satisfaction, that the amount thus verified, together with 121*l.* 13*s.* 2*d.*, should be the sum awarded, and that Ramshay should draw the award. Fawcett, the umpire, deposed that he and Ch. Middleton called on Miss Raper the same evening, but it was not convenient to her then to tell them the amount of interest, and Fawcett thereupon agreed with C. Middleton that he, C. Middleton, should learn the amount from Miss Raper and send it to Dodsworth.(a) Dodsworth deposed that he, after the meeting of May 15th, ascertained from Miss Raper the amount of interest, which "agreed, on being compared, with the amount noted down by the said Christopher Middleton."(b)

(a) Christopher Middleton's affidavit made no mention of the visit to Miss Raper.

(b) The affidavit did not further state any noting by Christopher Middleton, with respect to the interest.

Among other grounds, stated in the rule nisi, for setting aside the award,^(a) were the following. 1. That "no reasonable notice was given to *849] William Middleton of the meeting of arbitrators on the 15th May. 2. That W. Middleton was excluded from such meeting. 3. That W. Middleton never received notice of any of the arbitrators' meetings, and that he was never present at any other of their meetings, and never had any opportunity whatever of being present or addressing them in support of his case. 4. That the arbitrators examined Henry Plews, and other witnesses, without having previously administered to them any oath. 5. That the said arbitrators examined the said H. Plews and his witnesses, more especially Elizabeth Raper and George Cumming, in the absence of the said W. Middleton. 6. (Not material.) 7. That George Dodsworth, one of the arbitrators, took evidence of witnesses in the absence of the two other arbitrators, and afterwards reported the same to them. 8. That G. Dodsworth, one of the arbitrators, and John Fawcett, the umpire, held a meeting at which Christopher Middleton, the other arbitrator, was not present, and, at such meeting, determined upon and made their award in the absence of the said Ch. Middleton, and without giving him any notice or affording him an opportunity of being present at such meeting. Two other grounds were assigned, which it is unnecessary to state.

Pashley now showed cause. Assuming that the referees did wrong, the error does not amount to procurement *of an arbitration or umpirage *850] "by corruption, or undue means," within stat. 9 & 10 W. 3, c. 15, s. 2. At the meeting of May 15th, there was a full disclosure of the accounts to the satisfaction of all the referees, and nothing remained to be settled but the question as to a few pounds' interest. A mistake in ascertaining a matter of such trifling importance will not vitiate the award; *Atkinson v. Abraham*, 1 B. & P. 175. In *Matson v. Truwer*, Ry. & M. 17, the umpire, after receiving from the arbitrators a statement of the points on which they disagreed, examined each of the parties in the absence of the other; and, in an action of assumpsit on the award, this was made a ground of objection: but ABBOTT, C. J., said: "It does not appear that either party desired to be present when the other was examined; legal men indeed usually examine one party in the presence of the other, but among mercantile persons a different practice prevails; the umpire here was a mercantile man, and the defendants not having expressed a desire to be present at the examination of the plaintiffs, cannot now object to its having taken place in

(a) *Godson*, in moving for the rule, (November 23d, 1844,) stated that the opposite party had possession of the agreement of reference, and would not produce it for the purpose of its being made a rule of court, though the agreement provided that this should be done. In order that the opportunity of moving might not be lost by the lapse of a term, he prayed that the court would either receive a copy of the submission as the original, or permit the motion to be made in the next term. He cited *Re Perring*, 3 Dowl. P. C. 98. [Lord DENMAN, C. J. To avoid objections under the statute you had better move now.] *Godson* then stated the grounds of motion.

Per Curiam. (Lord DENMAN, C. J., WILLIAMS and COLERIDGE, Js) Rule nisi.
A verified copy of the agreement of reference was made a rule of court; and the rule nisi was drawn up on reading (among other things) the rule so made.

their absence." [Lord DENMAN, C. J. That is very unlike Lord TENTERDEN's views in general. You do not show any acquiescence here on the part of W. Middleton, who was only going in and out occasionally during the arbitration. And, if he did not acquiesce, were not undue means used? COLERIDGE, J. Upon these affidavits it would be strong to say that W. Middleton consented. In *Matson v. Trower*, each party was examined separately, and neither objected. Lord DENMAN, C. J. Each knew that he himself was separately heard; and neither could well object that the other was so treated.] In *Hewlett v. Laycock*, 2 Car. & P. 574, the *arbitrators excluded the parties and their attorneys, and examined [*851 witnesses at the witnesses' own houses; but ABBOTT, C. J., held that this did not authorize one of the parties to revoke his submission. [COLERIDGE, J. The objection was taken too late.] The principle of that case is adopted by the Court of Common Pleas in *Bignall v. Gale*, 2 Man. & Gr. 830. [Lord DENMAN, C. J. So is that of *Atkinson v. Abraham*, 1 B. & P. 175, expressly; but, when that case and *Bignall v. Gale* were before us lately, (a) we did not accede to their authority, but adopted a very different rule, laid down by Lord ELDON in the commencement of his career, *Walker v. Frobisher*, 6 Ves. 70. Arbitrators are not bound to the strictness which belongs to judicial proceedings in court. An award ought not to be opened unless it be so notoriously against justice and the duty of an arbitrator that misconduct must be inferred; per Lord ELLENBOROUGH in *Chace v. Westmore*, 13 East, 357. WILSON, J., says, in *Morgan v. Mather*, 2 Ves. Jun. 15, 18: "The only grounds" for setting aside awards "are, first, that the arbitrators have awarded what was out of their power; secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there is no corruption, as if without reason they will not hear a witness; thirdly, that they have proceeded upon mere mistake, which they themselves admit." As to the examinations without oath, the submission to arbitration did not empower the referees to administer an oath to any but the parties to the reference.

**Godson*, contra, was stopped by the court.

Lord DENMAN, C. J. I think we are bound here by the principle [*852 which has been stated in argument against the rule. An award is procured by "undue means" if it is arrived at by a departure from natural justice in ascertaining the facts, as WILSON, J., suggests in *Morgan v. Mather*, 2 Ves. Jun. 18. Here, the ascertaining of facts by one arbitrator apart from the other, and by examination of an interested witness, was a departure, not merely from established courses of procedure, but from natural justice. The proceeding was not one by which a party to the reference ought to have been affected.

PATTESON, J. I am of the same opinion. It is true that the erroneous proceeding related to a very small matter: but, if it were sanctioned in

(a) See *Dobson v. Groves*, ante, p. 637.

any instance, the referees in every case of joint arbitration might agree to carry on their inquiries apart, and, if they concurred in the result, decide accordingly. The rule must be made absolute.

COLERIDGE, J. To uphold this award would be to authorize a proceeding contrary to the first principles of justice. The arbitrators here carried on examinations apart from each other, and from the parties to the reference; whereas it ought to have been conducted by the arbitrators and umpire jointly, in presence of the parties.(a) Rule absolute.

(a) Wightman, J., was absent.

*853]

*Ex parte BATEMAN. Jan. 29.

A person who has served an attorney under articles of clerkship, being at the same time a barrister, cannot claim to be admitted an attorney in virtue of such service; although he has been disbarred before making the application.

KNOWLES moved that an instruction might be given by this court to the examiners of attorneys, to examine Joshua Wigley Bateman, with a view to his being admitted an attorney. The affidavits on which he moved set forth the following facts.

On September 2d, 1826, Mr. Bateman was articled to Henry Hughes, an attorney and solicitor in chancery, for five years. He served for three; and the articles were then determined by mutual consent: and, in October, 1829, Bateman entered as student of a college in Cambridge, where he took the degree of Bachelor of Arts in January, 1833. For about three years from that time he was engaged as a student in the chambers, respectively, of Mr. Dugmore and Mr. Duval, barristers; and in or about 1831, he was admitted a student of the Middle Temple, where he kept terms for the purpose of being called to the bar. He was called by that society in May, 1835, and was in practice as a conveyancer from some time in 1836 to the end of 1842. At the end of that year he quitted his practice at the bar, and did not afterwards engage therein; and, by articles of clerkship, dated January 22d, 1843, he bound himself to William Hughes Brabant, attorney at law and solicitor in chancery, to serve him as articled clerk in his said profession for the term of five years from the date last mentioned, with a proviso for liberty on Bateman's part to determine the articles if at any time before the expiration of the five years he should, by virtue of his former and present service, *or otherwise, be entitled to admittance
*854] as an attorney.(b) He continued to serve Mr. Brabant, as his

(b) The clause was as follows. "And, whereas the said Joshua Wigley Bateman hath been advised that he may properly apply to the court for the purpose of uniting a service under the present articles of clerkship with a service under former articles of clerkship," &c., "in order to make up a service of five years under articles, though the services for the two periods be not consecutive, and it is his intention, with the full consent and approbation of the said William Hughes Brabant, to make such application to the court, when, and so soon as he shall have served for a sufficient period under the present articles: Now this indenture further witnesseth, and it is hereby agreed," &c., "that, if at any time previously to the expiration of

clerk, down to the present time, and was not, during such period, "engaged in any other practice, profession, or business whatsoever." On the 17th of January instant, he was disbarred, on his own petition to the Society of the Middle Temple. His not having previously applied to be disbarred "arose from inadvertence, and from his not being aware that such a course would be considered necessary in order to a valid service under his last mentioned articles." The affidavit contained further averments, as to publication of notices.

The stamp on the original articles had been delivered up to the Commissioners of Stamps and cancelled, and allowed as a spoiled stamp under stat. 55 G. 3, c. 184. Sched. Part I. tit. *Articles of Clerkship*, (last clause so headed.)

*Knowles having stated the material facts,

Sir F. Thesiger, solicitor-general, and F. Robinson, showed cause [*855 in the first instance.(a) The three years' service under the first indenture cannot avail towards making up the required period. Mr. Bateman seems to have acted under the impression, that that instrument was useless when he took the benefit of that clause in the Stamp Act which enables parties to have the stamp on the first indenture cancelled, and treat it as a spoiled stamp. The unusual form adopted in the last indenture shows the same consciousness. The ordinary course, on a second indenture, is to bind for such a time only as will make up the period not completed under the former articles. Here the party binds himself anew for the whole period of five years, though with a peculiar proviso. To make the second service available, Mr. Bateman should have been disbarred. It is against principle, and evidently tends to endanger the correctness of practice, that a party should be ready at one and the same time to perform the functions of a barrister, and to seek admittance as an attorney. There is no precedent for granting such an application. On the contrary, in *Ex parte Cole*, 1 Doug. 114, where a person originally an attorney had been struck off the roll and called to the bar, and then moved to be again placed on the roll of attorneys, "the court refused to comply with the application, there being no instance of a barrister being admitted an attorney. They said he ought first to have applied to his society to be disbarred." In **Ex parte Warner*, 6 Jurist, 1016,(b) the applicant had been called to the bar, and [*856 then moved to be readmitted an attorney. WIGHTMAN, J., inquired if he

the said term of five years, the said J. W. Bateman shall, by virtue of his service for a period of three years as clerk to Henry Hughes, late of," &c., "gentleman, deceased, under certain articles of clerkship, bearing date the 2d day of September, 1828, and made or expressed to be made between," &c., "and his service under this present agreement, or otherwise, be entitled to be admitted attorney and solicitor of her majesty's courts of law and equity at Westminster, or any of them, then and in such case it shall be lawful for the said J. W. Bateman immediately thereupon or at any time thereafter to determine and put an end to this agreement."

(a) It was understood that this was done to prevent injury to Mr. Bateman, by the application remaining suspended in consequence of the doubt entertained by the examiners as to his admissibility.

(b) Bail Court, November 25th, 1842.

had been regularly disbarred, and said that, if he had, his application might be granted.

Knowles, contrâ. Stat. 2 G. 2, c. 23, sects. 5, 7, (a) imposes no other condition, as to clerkship, than that the party shall have been bound for five years to an attorney or solicitor, and have continued in such service. Where a person has been rejected as having held an office, or followed a business, incompatible with the study of his proper profession, the ground has been that he thereby adopted duties which required his time for inconsistent purposes. But the objection does not arise if he has only nominally held an office, which did not withdraw his attention from the requisite studies. The questions, 2, 3, and 4, to be put to the clerk by the examiners, "as to due service," (b) show the light in which this subject has been viewed by those who directed the examination: they all tend to ascertain whether the party has or has not in fact been withdrawn from the pursuits which belong to a clerkship. Here the answers to those questions would be such only as would authorize the examiners to admit. In the case *In the matter of Taylor*, 5 B. & Ald. 538, (c) an attorney was struck off the roll for want of a proper service, because during his clerkship he had been surveyor of taxes; but there the whole time had not in fact been given to the duties of the clerkship. *On the other hand, in *William Fletcher's Case*, 2 W. Bl. 734, where the duties had bonâ fide been discharged, though not under stamped articles, the court allowed the party to be admitted, the articles under which he had served being first stamped. Many other cases have been decided on the same principle. (d) The interval between different periods of which the service had been made up (the first period under articles which were lost) was held immaterial in *Richard Carter's Case*, 2 W. Bl. 957, the intermediate time having been spent in the same manner as if the party had been under articles. In *Ex parte Cole*, 1 Doug. 114, it appears that the court would have granted admission if the party had been disbarred at the time of moving. So far the case is in favour of the present application. That the original articles here were put an end to by mutual consent, cannot affect the right acquired while they subsisted; the service under these articles will still unite with that under the articles of 1843, and make up a qualification. The mode of stamping adopted here was the only one which could suit the case. [Lord DENMAN, C. J. It was remarked upon as showing the party's own view of his status: the stamp is not made a ground of objection.] (Sir F. Thesiger, solicitor-general, assented to this.)

Lord DENMAN, C. J. The examiners did very properly in bringing this question before the court. The case is perfectly new. I do not think it any answer to the objection now raised, that there is no statutable disquali-

(a) See stat. 6 & 7 Vict. c. 73, s. 3.

(b) *Reg. Gen. Easter*, 6 W. 4, 4 A. & E. 771.

(c) And see *In the matter of Taylor*, 4 B. & C. 341.

(d) See *Regina v. The Scriveners' Company*, 3 Q. B. 939.

fication to prevent this gentleman's admission. No *imputation is thrown upon his conduct; but the position in which he has placed himself requires the court to exercise its judgment whether a person so circumstanced ought to be admitted an attorney. The question does not turn upon the statute, but upon the power of admission belonging to the court, and which involves the power of rejection. It is our duty to inquire, in a doubtful case of this kind, whether the course adopted is one which ought to exist and to become a precedent. In this case I think that it ought not. The danger to which it leads is great and manifest; and, however we may regret that a gentleman whose character appears free from all taint should be impeded in his course of exertion, or suffer any inconvenience, we are still bound to take care that no opportunity may be given for malversation, through the connection which may exist between barristers and gentlemen in the other branch of the profession. There is, in the practice now before us, a danger of that kind, which the solicitor-general has adverted to. If a person in the situation of this gentleman thought proper at the end of two years' clerkship to continue at the bar and practice, one cannot but see that the service in the attorney's office might lead to the most improper advantages. I feel confident, from what has been stated, that the remarks I make do not apply to this case; but we must look to the consequences which might ensue if the conduct pursued here were to become more general. The cases which have been cited (with the exception of *Ex parte Cole*, 1 Doug. 114) do not apply. The dispensing with articles lost or unstamped comes under a different consideration *from any that belongs to this case. It would be cruel not to allow for [*858 accidents, and to permit a mere revenue objection to stand in the way, where the party was in no fault. But, in *Ex parte Cole*, a person who had been an attorney, and was struck off the roll at his own request, and called to the bar, applied to be replaced on the roll, not having been first disbarred. The court refused to comply with his application, there being no instance of a barrister being admitted an attorney. Then, if the office of a barrister and that of an attorney cannot be held together, can a party who has held the office of barrister while serving as an attorney's clerk demand to be admitted an attorney in virtue of a service performed under circumstances in which he could not regularly have acted as a principal? It appears to me that this case is a strong authority against the present application, and that, exercising the discretion vested in us, we should be wrong in allowing it to be doubted for a single moment that the practice in question cannot be permitted, and that a person whose service as clerk has been performed while he was a barrister cannot avail himself of such service for the purpose of being admitted an attorney.

PATTESON and COLERIDGE, Js., concurred. (a)

Application not granted

(a) Wightman, J., was absent

*860] *RICHARD ADAMS v. WILLIAM ADAMS. Jan. 31.

Lands were devised, (before stat. 7 W. 4, & 1 Vict. c. 26,) to L. and his heirs, in trust to permit and suffer A. to take the rents and profits during A.'s life, "with this proviso, to pay" W., out of the same, an annuity for her life, and, if A. died before W., to permit W. to enjoy the lands for her life: and, after the deaths of A. and W., devisor gave and devised the lands to the heirs male of A., remainder over.

A. and W. both survived the devisor. A. survived W., and, after W.'s death, suffered a common recovery.

Held that, assuming L. to have had a legal estate during W.'s life, A. was legal tenant in tail male after W.'s death, and that the recovery barred the estate tail and remainders.

TRESPASS quare clausum fregit.

Pleas. 1. Not guilty. Issue thereon.

2. That the close was not the close of plaintiff. Issue thereon.

3. That the close was the close, soil and freehold of defendant. Repliation traversing this. Issue thereon.

On the trial, before COLERIDGE, J., at the Devonshire Summer assizes, 1843, a verdict was found for the plaintiff, subject to a case, which, so far as material to the point decided by the court, was as follows.

Richard Adams was seised in fee of the close in question, and, having been twice married, died in 1791, leaving a widow, who died in 1792, and three sons, namely, William, his son by the first marriage, who died in 1797; Richard, his eldest son by the second marriage, who died in 1830; and John, his second son by the second marriage, who died a bachelor in 1823. William Adams, the defendant, is the eldest son of William: and Richard Adams, the plaintiff, is the eldest son of the last mentioned Richard, and heir at law of his uncle, the said John Adams.

The testator, Richard Adams, by his will, dated 26th December, 1790, gave and devised as follows.

"I give, devise and bequeath all those my freehold lands, hereditaments and premises, lying in Stoke Gabriel, to Samuel Lane, of," &c., "Richard Ford, of," &c., "John Jackson, of," &c., "and their heirs, upon trust for such persons and for such uses here mentioned, and for no other use, intent

or purpose whatsoever. That is to say: *permit and suffer my son *861] John to take the rents, issues and profits of one dwelling-house, outhouses, barn, courtlage, one orchard adjoining, one close of land called Hartland, two closes of land called Long Astones, with common on Lidstone, one close of land called Wramslade, late converted to an orchard, during his life, subject with this proviso, to pay my wife, or her assigns, one annuity or yearly rent of four guineas of lawful money, clear of all outgoings, issuing out of the same, during her life, paid by four quarterly payments, the first quarter's payment to be paid the first quarter day after my decease, and to have the two chambers over my kitchen, with the household goods that are therein, and part of my other household goods, as many as she shall want for her use, during her life, with apples of my orchard, and any thing in my kitchen garden for her use, all during her life. If

my son John die before my wife, permit my wife to enjoy the above lands during her life. After my wife's and my son John's decease, I give and devise the above lands and premises to the heirs male of my son John, lawfully begotten of his body. In default of such issue male, permit and suffer my son William to take the rents," &c., (for the life of William, with a proviso to pay out of the lands two annuities to a grandson and granddaughter of devisor respectively, and, after William's death, the lands to the heirs male of William; remainder over.)

The testator had been, for many years previously to the date of his will, in possession of Harland, the close in question, (and so called in the will,) and died seised in fee of it, and in possession. Upon his death, his son John entered into possession, pursuant to the will, and continued so.

*On the 24th May, 1810, by lease and release purporting to be for docking, barring and destroying the estate tail of the said John Adams, and all other estates tail, and all reversions and remainders, estates and contingencies thereupon expectant, &c., the said John Adams conveyed the close in question, with other property, to Robert Brutton and his heirs, to the intent that he might become a perfect tenant of the freehold, so that a recovery might be suffered. And it was thereby declared that the recovery, &c., should enure to the use of such person, and for such estate and interest, as the said John Adams should by deed or will appoint, and, in default of such appointment, to the use of the said John Adams for life, and, after the determination of that estate, to the use of John Brutton and his heirs during the life of the said John Adams, upon trust for the said John Adams, and, upon the determination of that estate, to the only proper and absolute use and behoof of Richard Adams, the plaintiff, his heirs and assigns for ever. [*862]

In pursuance of this deed, a recovery was duly suffered in the ensuing Trinity term of the premises in question, among others.

John Adams remained in possession until his death in 1823. Richard Adams, the plaintiff, then entered into possession, and has continued so up to the present time. The act of trespass was admitted.

It was contended, at the trial, by the counsel for the defendant, that John Adams took an equitable estate only, for his life, under the will of Richard Adams, and a legal estate tail in remainder under the same instrument; and therefore, that the recovery was inoperative to bar the estate tail or the remainder over.

*The question for the opinion of the court was, whether, with reference to this point, the defendant is entitled to the land, as heir at law of the testator Richard Adams, or as devisee under his will. If the court should so think, a verdict was to be entered for the defendant on the second and third issues, otherwise to stand for the plaintiff. The verdict upon the other issue was to stand for the plaintiff. [*863]

The case was argued in this term.(a)

(a) January 17th. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js

Hodgson for the plaintiff. John Adams took a legal estate under the will; and, if so, the recovery was good. According to the rule in *Shelley's Case*, 1 Rep. 93 b, 104 a, (a) John Adams had a legal estate in tail male at the time of the recovery, if the limitation in the will gave him a legal estate for life. The limitation is to Lane, Ford, and Jackson, and their heirs, upon trust to permit and suffer him to take the rents, issues, and profits, during his life: that gives him a legal estate for life; *Broughton v. Langley*, 2 Salk. 679, S. C. 2 Ld. Raym. 873; PARKE, B., in *Barker v. Greenwood*, 4 M. & W. 421, 429. (b) It would be otherwise if the three were directed to pay the rents; they would then take a legal estate; *Jones v. Lord Say and Seal*, 1 Ca. Eq. 384; (c) Lord KENYON in *Doe dem. Willis v. Martin*, 4 T. R. 39, 63, 64. So, if a legal estate in trustees were required to protect contingent remainders, or if they were directed to permit a party to take the *clear* or *net* rents; *White v. Parker*, 1 New Ca. 573; *864] **Barker v. Greenwood*, 4 M. & W. 421. It will be argued that, as the three devisees are to pay the widow four guineas annually for her life, they must take a legal estate. But, first, the payment is to be made by John Adams himself, not by the three devisees. (d) And, if this be not so, they would hold the legal estate only during the life of the widow, who died before the recovery was suffered. In *Doe dem. Player v. Nicholls*, 1 B. & C. 336, copyhold land was devised to trustees, in trust for P., to be transferred to him when he should attain the age of twenty-one: and it was held that, on attaining that age, P. might be admitted without any act of the trustees. *Doe dem. White v. Simpson*, 5 East, 162, is a strong instance of limiting the legal estate of trustees by the duration of the purposes of the trust. Those cases are inapplicable in which the purposes of the will required a complete dominion over the land, as where debts were to be paid out of the rents, and by sale from time to time: *Wykham v. Wykham*, 18 Ves. 395, (e) was such a case. But, further, neither the three devisees nor the widow took any estate in the land itself: their legal estate, if any, was only a rent charge with power of distress, as in *Bultery v. Robinson*, 3 Bing. 392.

Crowder, contra. First. A devise to A. and his heirs in trust, to permit B. and his heirs to take the rents and profits, undoubtedly gives a legal estate in fee to B., unless something appear which shows that the *865] *use is not to be executed in B. but in A.: but, when that does appear, the direct limitation to A. in fee takes effect as a legal estate; *Smith dem. Dormer v. Packhurst*, 3 Atk. 135; *Doe dem. Leicester v. Biggs*, 2 Taun. 109; *Biscoe v. Perkins*, 1 Ves. & B. 485. Thus, if the trust be to permit a feme covert to take the rents to her separate use, the trustees

(a) See 1 Fearn, Cont. R. 33, 34, 10th ed.

(b) See note (17) and (s) to *Jefferson v. Morton*, 1 Wms. Saund. 11 g, (ed. 6.)

(c) S. C., more fully, 8 Vin. Abr. 262, tit. *Devise*, (C. b.) pl. 19.

(d) Several parts of the will were referred to, as to this point, on both sides; but, as the court, in deciding in favour of the plaintiff, assumed the point to be against him, it is not thought necessary to report this part of the argument at length.

(e) See p. 414.

take the legal estate; *Harton v. Harton*, 7 T. R. 652; *Robinson v. Grey*, 9 East, 15: so, if the receipts of the cestui que trust are to be valid only with the approbation of one of the trustees; *Gregory v. Henderson*, 4 Taun. 772. And *White v. Parker*, 1 New Ca. 573, and *Barker v. Greenwood*, 4 M. & W. 421, are in accordance with the rule thus qualified. Here the trustees are to pay an annuity: the language of the will does not admit the supposition that the son is to pay.^(a) Next, if the trustees had a legal estate it did not expire at the wife's death. It is true that trustees take only so large a legal interest as the purposes of the trust require: but an event which renders the legal estate no longer necessary does not determine their legal estate, if the words of the will or deed give them a larger estate in the first instance; *Doe dem. Shelley v. Edlin*, 4 A. & E. 532, 589.^(b) At any rate the trustees, to divest themselves of their legal estate, should have conveyed.

Hodgson in reply. *Warter v. Hutchinson*, 1 B. & C. 721,^(c) and *Doe dem. Noble v. Bolton*, 11 A. & E. 188,^(d) show that the legal estate of *the trustees terminated at the widow's death, because the purposes of the trust, as contemplated in the will, were limited to her life. [*866

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the court.

The case turned on the question, whether John Adams, the recoverer, had a legal or equitable estate when he suffered the recovery. The defendant argued that it was only equitable, because the use was executed in the trustees, who were required by the will to perform certain duties; and, though those duties had wholly ceased by the death of the wife before the recovery, still he contended that their estate continued, because originally limited to them and their heirs.

We wished for time to consider this argument, which appears to be now first urged, a circumstance not very consistent with its correctness, since, if it had been valid, many of the cases might have been affected by it. PARKE, B., in *Barker v. Greenwood*, 4 M. & W. 429, expressly holds that it makes no difference. "There is no doubt that the general rule of law is, that wherever there is a limitation to trustees, although with words of inheritance, the trustees are to take only so much of the legal estate as the purposes of the trust require." He refers indeed to no authority for this proposition: but a very little reflection on the nature of the case proves that he is right. For the manner in which an estate in fee is created is immaterial to this consideration. Whether created by implication or by express words, *it will equally be executed in the cestui que trust when it is held by the trustees, discharged of all personal duties in [*867 them, for the sole and direct benefit of the cestui que trust.

(a) The argument on this point is omitted, for the reason before stated.

(b) See *Doe dem. Cadogan v. Ewart*, 7 A. & E. 636, 666.

(c) See *Warter v. Hutchinson*, 2 Brod. & B. 349.

(d) See *Ackland v. Lutley*, 9 A. & E. 879.

The object of the testator in the case, giving certain advantages to the widow, terminates with her life; and on her death the will becomes the same as if the words effecting that object had never appeared in it.

This our only doubt being removed, we are bound by all the decisions to hold that John Adams had the legal estate, the recovery was good, and the plaintiff must have judgment. (a) Judgment for plaintiff.

(a) See *Doe dem. Davies v. Davies*, 1 Q. B. 430; and stat. 7 W. 4, & 1 Vict. c. 26, s. 30, 31.

In the Matter of MANDER, Gent., One, &c. Jan. 31.

An outlaw cannot, for his own benefit, move to have an attorney's bill taxed. So held, where the outlaw was administrator, with the will annexed, by which all the personal estate was bequeathed to him, subject to payment of the debts, &c., and one of the bills which he sought to tax related to business done for himself and the testatrix jointly, and the other to business done for the testatrix alone.

A RULE was obtained in this term, calling upon James Mander to show cause why his bills of costs, &c., in all causes and matters wherein he had been concerned for the late Right Hon. Louisa Countess of Mansfield, and the Hon. Robert Fulke Greville, respectively delivered to Messrs. Beavan & Anderson as his (Mr. Greville's) attorneys and on his behalf, and as administrator to the said countess, pursuant to certain orders of Mr. Justice Erskine, should not be referred to one of the masters to be taxed, the said Hon. R. F. G., as administrator as aforesaid, undertaking to pay what, upon such taxation, may appear to be due, &c.: and why, on *868] *payment by the said Hon. R. F. G., as administrator as aforesaid, of what, if any thing, should appear due to Mander, he should not deliver up to the said Hon. R. F. G. or his attorneys, all deeds, books, papers, &c., in his possession, &c., belonging to the said late Right Hon. L. Countess of M., or the said Hon. R. F. G. respectively.

Two orders had been made by Erskine, J., (March 27th and 30th, 1844,) the first requiring Mander to deliver his bill of costs in all causes and matters wherein he had been concerned for the Hon. R. F. Greville, and, on payment of what should appear due, to deliver up all deeds, &c., belonging to Mr. Greville: the second to a like effect as to Mander's bill of costs in causes, &c., wherein he had been concerned for the late Countess of Mansfield. Both orders were made on the application of Mr. Greville; the latter in the character of administrator, with the will annexed, of the late countess, his mother. Mander accordingly delivered two bills in May, 1844. The first was headed, "Dr. the Countess of Mansfield and The Hon. R. F. Greville in account with J. Mander," and stated a balance in Mander's favour of 3080*l.*: the second was headed "The Countess of Mansfield in account with J. Mander," and claimed 248*l.* 12*s.* 11*d.*

By affidavit in support of the rule it appeared that, before delivery of the bills of costs, a bill in chancery had been filed by a creditor, and a

decree obtained thereon, to administer the estate of the late countess; and, soon after delivery of the bills of costs, (July, 1844,) the creditors of the countess had been desired by advertisement to come in and prove their debts before the master to whom the cause was referred. Mr. Mander *did not so come in; and thereupon Mr. Greville took out summonses to tax. The parties were heard at chambers, (1st, 6th and [869 9th January, 1845;) and it was objected, on Mander's part, that Mr. Greville was an outlaw. The learned judge before whom the case was finally heard, on the 9th, "entertained the objection; but he said that that did not prevent" Mr. Mander's "applying to this court." The affidavit stated that there were ample funds belonging to the countess's estate, to pay all claims, and particularly a sum of 10,000*l.* in cash, and available securities to the amount of 3000*l.*, in the hands of Messrs. Hoare.

An affidavit in opposition to the rule showed that Mr. Greville had been outlawed in January, 1843, at the suits of several parties,^(a) and that such outlawries were still in force. It further set forth that the bill in chancery above mentioned was filed by Sir Benjamin Smith against Mr. Greville, as administrator with the will annexed, but that Sir B. Smith filed it as a creditor of Mr. Greville, not of the countess, the bill in chancery stating that the countess had by her will bequeathed all her personal estate not otherwise disposed of to Mr. Greville, subject to the payment of her debts and funeral and testamentary expenses, and, further, that, before the countess's death, Mr. Greville being indebted to Sir B. Smith, had, by indenture dated February 8th, 1844, bargained, sold and assigned to Sir B. Smith all the moneys, personal property, &c., to which Mr. Greville was or might become entitled under the countess's will, or as one of her next of kin if she died intestate; habendum to Sir B. Smith, his executors, &c., for his and their *own use, but in trust for securing the moneys due to [870 him from Mr. Greville; and that Mr. Greville had, by the same indenture, authorized Sir B. Smith to commence and prosecute all and any actions and suits for the recovery of the said moneys. The affidavit stated the prayer of the bill to be that an account might be taken of the countess's personal estate come to the hands of Mr. Greville, or of any person by his order, &c., and of the funeral expenses, &c., and that such estate might be applied in a due course of administration, and the surplus ascertained and paid over to Sir B. Smith on the trusts of the indenture. The affidavit further stated that Mr. Greville, by his answer to the bill, admitted the debt to Sir B. Smith, and the giving of the indenture as security. It was further deposed that Mr. Greville was now living out of the jurisdiction of this court.

Hoggins now showed cause. An outlaw cannot appear in court for any purpose but to reverse his outlawry; *Aldridge v. Buller*, 2 M. & W. 412.

Martin and *E. V. Williams*, contra, were called upon by the court. On general principle, nothing prevents an outlaw from claiming to have his

(a) *Sparding and Hummell*; *Clarke and Clarke*; and *James Smith*.

attorney's bill taxed. But, further, as to a large part of these bills the demand is against Mr. Greville and the countess jointly. [COLERIDGE, J. Mr. Greville is primarily liable as survivor.] He is liable in equity upon the joint account, as administrator to the countess. [WIGHTMAN, J. He is not charged as administrator by Mander.] He might be proceeded against in equity; and that *court would not tax a common law bill. In-
 *871] justice would be done to the creditors of the countess's estate if this court would not order the joint account to be taxed. In *Walker v. Thelluson*, 1 Dowl. N. S. 578, WILLIAMS, J., said: "All the cases are resolvable into this proposition, that if the outlaw is seeking to enforce a legal right of his own, he cannot be heard; but the case is different, when he is only protecting himself from the claims of others. That was a distinction taken by Lord LANGDALE, in the case of *Hawkins v. Hall*, 1 Beavan, 73, and his lordship held that although he cannot be heard to originate a proceeding for the enforcement of any matter of right, yet in matters purely defensive he may be heard. My brother WIGHTMAN, before whom this case has already been in another shape,(a) acceded to that distinction." [WIGHTMAN, J. I acted on that case in *Davis v. Travanion*, 2 Dowl. & L. 743.] Mander has delivered the bills to Mr. Greville, knowing him to be an outlaw. He cannot object, by reason of the outlawry, to their being taxed. [Lord DENMAN, C. J. Has he brought an action? COLERIDGE, J. If he has not, will not your application be in time when that is done?] By stat. 6 & 7 Vict. c. 73, s. 37, the party chargeable cannot demand a taxation after the lapse of twelve months from the delivery of the bill. [WIGHTMAN, J. "Except under special circumstances." COLERIDGE, J. These would be so.] In *Hamlin v. Crossley*, 8 A. & E. 677, it was held that an outlaw petitioning under the then Insolvent Debtor's Act, 7 G. 4, c. 57, might claim to be discharged from custody under a *capias utlagatum*. The
 *872] clauses there relied upon (sects. 10, *50) were not more generally worded than stat. 6 & 7 Vict. c. 73, s. 37. [PATTESON, J. Under stat. 2 G. 2, c. 23, s. 23, taxation was ordered on the undertaking of the party chargeable to pay what should appear due; under stat. 6 & 7 Vict. c. 73, s. 37, there is no such undertaking, but the taxation takes effect by a judgment, (sect. 43.) How would that operate in the case of an outlaw?] The object here is only to ascertain what is really due, there being ample funds. The disability of an outlaw to take legal proceedings attaches only when he proceeds in his own right. "If he sues *en auter droit*, as executor, administrator, or as mayor with his commonalty, outlawry shall not disable him, because the person whom he represents has the privilege of the law, and outlawry being no objection to his representation, it is no objection but he should be answered." 6 Bac. Abr. 66, tit. *Outlawry*, (D) 3, 7th ed.(b) [PATTESON, J. An administrator or executor is not liable personally to cos's.] The outlawry would not protect him from

(a) *Walker v. Thelluson*, 1 Dowl. N. S. 277.

(b) Also, *ibid.* p. 70.

payment of costs as administrator.(a) [PATTESON, J. The party claiming them could not get at him.] If the court thought proper here to direct the costs to be taxed on conditions, pursuant to stat. 6 & 7 Vict. c. 73, s. 37, (the taxation not having been applied for within a month,) an order might be made that a sum of money, from the countess's estate, should be brought into court. Mr. Greville has a sufficient interest in the residue to authorize such a course. The money would be brought in subject to the control of the Court of Chancery.

*Lord DENMAN, C. J. This is a case to which the general rule applies. A party outlawed comes before us, moving, for his own benefit, that an attorney's bill of costs be taxed. He cannot make that motion. He can only apply to set aside the outlawry. If an action were brought against him the case would be different. It was suggested that this rule might be made absolute on the money being brought into court: but that cannot be done, the money being under the control of the Court of Chancery. [*873]

PATTESON, COLERIDGE, and WIGHTMAN, Js., concurred.

Rule discharged.

(a) Hoggins, contra, suggested that letters of administration could not legally be granted to an outlaw; but E. V. Williams disputed this.

FITZBALL v. BROOKE. Jan. 31.

Plaintiff, under stat. 3 & 4 W. 4, c. 15, s. 2, recovered 12*l.* against defendant in an action of debt, for six performances of a dramatic piece, of which plaintiff was the author, without plaintiff's consent; and the declaration averred that 40*s.* was the greatest damage sustained for each performance.

Held, that this was a debt recovered, within stat. 7 & 8 Vict. c. 96, s. 57, and that defendant could therefore not be taken upon a *ca. sa.* on such judgment.

THE declaration stated that defendant had been summoned to answer plaintiff "in an action of debt," and that "the plaintiff demands of the defendant the sum of 12*l.*, which the defendant owes to and unjustly detains from him, for that whereas, heretofore and before the committing of the several grievances by the defendant," &c., and after the passing of a certain act, &c., (3 & 4 W. 4, c. 15,)(b) to wit on, &c., "the plaintiff" *did compose, print and publish a certain dramatic piece called [*874]

(b) Stat. 3 & 4 W. 4, c. 15, "to amend the laws relating to dramatic literary property," by sect. 1, gives to the author of any dramatic piece not printed or published by him or his assignee, or to the assignee of such author, as his own property, the sole liberty of representing, or causing to be represented, at any place of dramatic entertainment in Great Britain, &c., any such production not printed and published, &c., and gives to the author of any such production thereafter to be printed and published, or his assignee, the like sole liberty for twenty-eight years from the day of first publication, and, if he be living at the end of the twenty-eight years, for the residue of his natural life.

Sect. 2 enacts: "That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act, or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every

‘The Momentous Question:’ and, from the time the same was so composed,” &c., “as aforesaid hitherto, the plaintiff hath been and still is the proprietor thereof, and, during all the time aforesaid, has had as his own property the sole liberty of representing or causing to be represented the said dramatic piece at any place or places of dramatic entertainment whatsoever in any part of the united kingdom,” &c. “Nevertheless the plaintiff says that, after the making and passing of the said act of parliament, and within twelve calendar months next before the commencement of this suit,^(a) and also whilst the plaintiff was such proprietor of the said dramatic piece as aforesaid, and had such sole liberty of representing or causing to be represented the same as aforesaid, and during the continuance *of such
 *875] sole liberty as aforesaid, he the said defendant on divers, to wit on six several, occasions, to wit on the 6th,” &c., “and on the 13th days of September, A. D. 1844, contrary to the intent of the said act of parliament and the right of the plaintiff as such author as aforesaid, and without the consent in writing of the plaintiff first had and obtained, did cause certain parts of the said dramatic piece to be represented at a certain place of dramatic entertainment in England, to wit at,” &c., “contrary to the form of the statute in such case,” &c., “and contrary to the right of the plaintiff as author as aforesaid, and also to his great injury, loss and damage: whereby, and by force of the statute in such case,” &c., “the defendant, in respect of each and every of the said representations, became liable to pay to the plaintiff, being such author and proprietor as aforesaid, and having such sole liberty as aforesaid, an amount not less than 40s. or the full amount of the benefit or advantage arising from such representations, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages. And the plaintiff says that the sum of 40s. was the greatest damages recoverable by the plaintiff, according to the form of the statute in such case,” &c., “in respect of each representation of the said piece by the defendant as in this count mentioned, whereof the defendant had notice: whereby, and by force of the statute in such case,” &c., “an action hath accrued to the plaintiff to demand and have of and from the defendant six several sums of 40s. each, making together the sum of 12l., the sum above demanded.”

Judgment for want of a plea was signed for 12l. and costs; and a ca. sa. issued, on which defendant was arrested, January 20th, 1845. He paid the sheriff the *sum endorsed on the writ, amounting, with interest,
 *876] to 26l. 11s., under protest, and was discharged. He then took out a summons to show cause before a judge at chambers why the ca. sa.

such representation to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, which ever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietors, in any court having jurisdiction in such cases in that part of the said united kingdom or of the British dominions in which the offence shall be committed.”

(a) See sect. 3.

should not be set aside, and the amount paid refunded, the debt for which the action was brought being under 20*l.*(a) WIGHTMAN, J., on the hearing, ordered the ca. sa. to be set aside, and the 26*l.* 11*s.* refunded by the plaintiff, defendant undertaking to bring no action.

Ogle now moved(b) for a rule to show cause why the learned judge's order should not be discharged with costs. This is not an "action for the recovery of any debt," within stat. 7 & 8 Vict. c. 96, s. 57. The action is for unliquidated damages; and the declaration here shows that it is of this nature, though the plaintiff estimates it at 40*s.* for each representation. *Davies v. Lloyd*, 3 M. & W. 69, where the action was in form debt for bribery under stat. 5 & 6 W. 4, c. 76, s. 54, but the Court of Exchequer held that the writ of summons did not require endorsement under the Uniformity of Process Act, 2 & 3 W. 4, c. 39, was a stronger case than this. If the words comprising that estimate had been omitted, there could have been no doubt: but the insertion of them cannot make that difference, in the application of stat. 3 & 4 W. 4, c. 15, which the defendant here must contend *for. [COLERIDGE, J., referred to *Fife v. Bousfield*, antè, [*877 p. 100; and *Planché v. Hooper*,(c) as illustrating the distinction between actions brought simply for penalties, and actions brought under penal statutes to recover compensation for injuries.] *Cur. adv. vult.*

Lord DENMAN, C. J., in the ensuing vacation, (February 12th,) delivered the judgment of the court.

The question is whether the defendant should be discharged from arrest. The action was for 12*l.*, made up of six sums of 40*s.*, for which the defendant was sued under stat. 3 & 4 W. 4, c. 15. The question is, whether this was, properly speaking, a debt, within the words of stat. 7 & 8 Vict. c. 96, s. 57. The former act gives to the plaintiff the option of recovering 40*s.* for each representation, or the damages (if exceeding that) which he sustains by each representation. On consideration, we think this was a debt recovered. The defendant therefore was rightly discharged.

Rule refused.

(a) Stat. 7 & 8 Vict. c. 96, (royal assent, 9th August, 1844,) s. 57: "And whereas it is expedient to limit the present power of arrest upon final process; be it enacted, that from and after the passing of this act no person shall be taken or charged in execution upon any judgment obtained in any of her majesty's superior courts, or in any county court, court of requests, or other inferior court, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment."

(b) Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

(c) The declaration (venue Middlesex) claimed ten penalties of 40*s.* each, under stat. 3 & 4 W. 4, c. 15, s. 2, for representing parts of a dramatic piece called "The White Cat," at a place of dramatic entertainment in England, to wit at the Theatre Royal, to wit at Bath, in the county of Somerset. Plea: Not guilty. The cause was tried before WILLIAMS, J., in the Bail Court, in Hilary term, 1844, and a verdict found for the plaintiff. *Thesiger*, in the same term, moved for a rule to show cause why the judgment should not be arrested, or a nonsuit or verdict for the defendant entered, on the ground that the action was brought in Middlesex, whereas, the acts complained of appeared by the record, and in evidence, to have been done in Somersetshire. He contended that, by stats. 31 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 4, s. 2, the venue was local. The court (after taking time to consider) ordered a special case to be stated. Before the case came on for argument, *Fife v. Bousfield*, (antè, p. 100,) was decided. In Hilary term, (January 21st,) 1845, *Planché v. Hooper* being called on, no one appeared for the defendant; and judgment was given for the plaintiff. Verdict to stand.

*878] *HANNAH FOSTER v. The Governor and Company of the
Bank of ENGLAND. Jan. 31.

The court will not allow, as a matter of right, that a plaintiff who sues in formâ pauperis shall amend the declaration, after special demurrer thereto, without payment of costs.

THE plaintiff sued in formâ pauperis, and declared in case. The defendants demurred specially. *Pearson*, in last Michaelmas term, obtained a rule nisi for leave to amend without payment of costs.

Bovill now showed cause. The defendants are unwilling to resist the application if the court think it would be fit for them to assent as a matter of indulgence: and they are ready to pay back the costs if the plaintiff succeed in the action. But, the application being pressed as a matter of right, it is necessary to obtain the judgment of the court on the law. In *Pratt v. Delarue*, 10 M. & W. 509, the Court of Exchequer held that a pauper plaintiff was not subject to interlocutory costs. There reference was made to R. Hil. 2 W. 4, I. 110, 3 B. & Ad. 390, (a) which provides that, when a pauper omits to proceed to trial, pursuant to notice or undertaking, he may be called on to pay costs, though not dispaupered. PARKE, B., in *Pratt v. Delarue*, appears to have considered that this was a new power, and confined to the particular cases specified. But the attention of the court was not called to the older cases. These are collected in 16 Vin. Abr. 260, *Paupers* (C), and show that, where a pauper acts vexatiously, he is liable to pay costs, and also to be dispaupered. The amendment is in itself a mere indulgence: *the plaintiff attempts to make the

*879] defendants pay for her own mistake.

Pearson, contrâ. Stat. 23 H. 8, c. 15, s. 2, provides that persons suing in formâ pauperis "shall not be compelled to pay any costs by virtue and force of this statute," (which gives costs to the defendant if the plaintiff be nonsuited or a verdict pass against him,) "but shall suffer other punishment, as by the discretion of the justices or judge, afore whom such suits shall depend, shall be thought reasonable." The immunity from costs is therefore a matter of right. [Lord DENMAN, C. J. We may refuse leave to amend, except upon payment of costs.] The court will not so exercise their power, the plaintiff being poor and the demurrer special.

Per Curiam. (b) As a matter of right, we certainly should not allow the amendment without payment of costs. But as the counsel for the defendants asks our advice, we would recommend that he allow the amendment without costs.

Bovill. The defendants will consent.

Rule absolute.

(a) See *Doe dem. Lindsey v. Edwards*, 2 Dowl. P. C. 471.

(b) Lord Denman, C. J., Patteson, Coleridge, and Wightman, Ja.

*HILARY VACATION.(a)

[*880]

FLETCHER v. CALTHROP and THARP.

Stat. 9, G. 4, c. 69, s. 1, gives a summary conviction, if any person "shall by night unlawfully enter or be in any land, whether open or enclosed, with any gun," &c., "for the purpose of taking or destroying game."

A conviction set forth that C. did, by night, "unlawfully enter certain enclosed land," "with a net, for the purpose of taking game, to wit partridges and pheasants, contrary to the form," &c. Held bad, for not stating the intent to be to take game there.

TRESPASS for assault and false imprisonment.

Plea. That, after the passing of a certain act, &c. (9 G. 4, c. 69,) (b) and before the time when, &c., and before the commencement of this suit, to wit, 24th October, 1843, at the parish of Soham in the county of Cambridge, plaintiff, with three other persons to defendants unknown, did by night, that is to say, after the expiration of the first hour after sunset, on Monday, 23d October, 1843, and before the beginning of the last hour before sunrise on Tuesday, 24th October, in the same year, to wit about the hour of one o'clock in the morning of the said 24th October, unlawfully enter certain enclosed land in the occupation of William Cornwell, and situate in the said parish of Soham, in the county aforesaid, with a net, for the purpose of taking game, to wit partridges and pheasants, by night, that is to say between the expiration of the first hour after sunset on the said 23d of October, and the beginning of the last hour before sunrise on the said 24th October, in the said enclosed land, contrary to the provisions of the said act of parliament; and thereby plaintiff then and there, and within the county aforesaid, became and was guilty of *an offence against the provisions of the said act of parliament. The plea then averred that defendants were justices [*881 of Cambridgeshire, and that, within six calendar months of the commission of the offence, to wit on, &c., at, &c., in the said county, plaintiff was charged before defendant Calthrop, upon the oath of, &c., a credible, &c., with the said offence, the same being an offence punishable upon summary conviction by virtue of the said act of parliament. That afterwards, to wit on, &c., at, &c., in the said county, plaintiff was brought before defendants on the said charge; and the said charge was then and there in his presence proved by, &c., being a credible, &c., upon oath; and plaintiff was then and there convicted by and before defendants, he being then and there present before defendants, of his said offence. Which conviction was afterwards, to wit on, &c., written on parchment, and signed by defendants, and afterwards, to wit on, &c., was returned by defendants,

(a) The court sat in banc during this vacation, on the 1st, 3d, 4th, 5th, 8th, 10th, 11th and 12th of February, and 1st of March.

(b) "For the more effectual prevention of persons going armed by night for the destruction of game."

then being such justices as aforesaid, to the quarter sessions then holden in and for the said county, in pursuance of the said statute in that case, &c., the same being the quarter sessions for the said county next after the said plaintiff was so convicted as aforesaid; which conviction was and is in the words following.

"Be it remembered that, on the 26th day of October, A. D. 1843, at the parish of Chippenham, in the county of Cambridge, Robert Fletcher the younger, late of the parish of Soham in the said county of Cambridge, is convicted before us, the Reverend John Calthrop, clerk, and Joseph Sidney Tharp, Esquire, two of her majesty's justices of the peace for the said county, for that he, the said Robert Fletcher the younger, on the 24th day of October, A. D. 1843, at the said parish of *Soham, in the said
 *882] county, with three other persons to us, the said justices, unknown, did, by night, to wit after the expiration of the first hour after sunset on Monday the 23d day of October, A. D. 1843, and before the beginning of the last hour before sunrise on Tuesday the 24th day of October in the same year, that is to say, about the hour of one of the clock in the morning of the said 24th day of October, unlawfully enter certain enclosed land in the occupation of William Cornwell, and situate in the said parish of Soham, in the county aforesaid, with a net, for the purpose of taking game, to wit partridges and pheasants, contrary to the form of the statute in such case made and provided: and we, the said justices, adjudge" defendant to be imprisoned and kept to hard labour for three calendar months, and to find sureties, &c. As by the record, &c.

The plea then averred that the conviction had not been quashed, but was still in full force; and that defendants afterwards, in pursuance thereof, issued their warrant, which was set out in the plea, and, as far as regards the point decided in the case, described the offence as in the conviction. The plea then identified the parties in the case with the parties named in the warrant and conviction, and added formal allegations of identity as to other particulars; and further averred that defendants delivered the warrant to a constable, who apprehended the prisoner: and it justified the acts mentioned in the declaration, under the above proceedings.

Special demurrer, assigning for cause, among others, (a) "that it is not
 *883] stated, and doth not appear, *in or by the said plea, or with any sufficient certainty, that the plaintiff unlawfully entered or was in the said close therein mentioned, with any gun, net, engine or other instrument, for the purpose of taking or destroying game therein."

Joinder in demurrer.

The case was argued in last term. (b)

Gunning for the plaintiff. The conviction is invalid. Sect. 1 of stat.

(a) Several points were raised by the demurrer and discussed in the argument; but the report is confined to the point on which the court decided.

(b) Friday, January 17th. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, J.

9 G. 4, c.69, gives the jurisdiction, and imposes the punishment, if any person "shall by night unlawfully enter or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game." The conviction omits to find that the purpose was to take game in that close which was entered. If this form were sufficient, a man might be punished who passed through a close at night with a gun, intending to kill game at some other place, his own land for instance, which he expected to reach in the morning. That might be a civil trespass, but is not the offence designated by the statute. The point arose in a case before PATTESON, J., in the Bail Court, *In re Fletcher*, 1 Dowl. & L. 726, but was not decided: the learned judge, however, intimated an opinion that the objection was fatal. There *Davies v. The King*, 10 B. & C. 89, was cited, in which case there was an indictment under sect. 9 of the statute, which makes it an offence "if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or enclosed, *for the purpose of taking or [884 any gun," &c.: and the indictment charged that the defendants, being to the number, &c., "did by night unlawfully enter divers closes," &c., "and were then and there in the said closes," &c., "armed," &c., "for the purpose of then and there taking and destroying game against the form of the statute:" and this was held insufficient, because it did not show either the intent with which the defendants entered, or that they were in the closes by night. In *Rex v. Gainer*, 7 C. & P. 231, COLERIDGE, J., held it necessary to prove that the defendants intended to kill game in the close in which they were. It is true that the indictment in that case used the word "there," the absence of which is here objected to: the decision related to the proof of an indictment so framed; and therefore the marginal note perhaps puts the result too generally. *Rex v. Capewell*, 5 C. & P. 549, is to the same effect as *Rex v. Gainer*. In *Regina v. Davis*, 8 C. & P. 759, PATTESON, J., said: "There is also this further difficulty—that the intent was evidently to kill game in the wood, into which none of the parties ever got for that purpose. It is true that they are charged with being in Shutt Leasowe; but they had no intention of killing game there." It will be said that the conviction here follows the words of the statute. But it is not enough to follow the words of a statute precisely. Examples are given by Mr. Dwarries of constructions restraining the language of the statute to its obvious intention. (a) *Chaney v. Payne*, 1 Q. B. 712, is a strong instance of this kind. **Worlledge*, contra. The gist of the offence is the entering by [885 night. [Lord DENMAN, C. J. Then you contend that, if a conviction distinctly alleged an entry into a close by night for the purpose of taking game elsewhere the next morning, it would be good.] The mischief appears to be the danger arising from the going about by night, even when

(a) See 2 Dwarries on Statutes, 734.

the intent is a destruction of game afterwards in another place. But, admitting that the statute points to the intent of taking the game in the particular place, it follows that the same meaning must be given to the words of the conviction as is given to those of the statute. It is enough to describe the offence in the words of the statute; *Rex v. Chandler*, 1 Ld. Raym. 581; *Rex v. Speed*, 1 Ld. Raym. 583; Paley on Convictions, 108, (3d ed.) In *Mann v. Davers*, 3 B. & Ald. 103, it was held that a conviction, under stat. 17 G. 2, c. 5, s. 1, of returning without a certificate after a removal by magistrates, was good without showing any act of vagrancy, inasmuch as it pursued the language of the statute. In *Rex v. Marsh*, 2 B. & C. 717, a carrier was convicted, under stat. 5 Ann. c. 14, s. 2, of having game in his possession as carrier; and it was held 'to be no objection that the conviction did not allege the possession to have been had knowingly, or negative the carrier's qualification. The rule laid down by this court in *Chaney v. Payne*, 1 Q. B. 721, is rather in favour of the defendants; for it is there said that "it may be sufficient, in describing an offence in a conviction, to follow the words of the act creating the offence, so far as the description of it goes." *Rex v. Capswell*, 5 C. & P. 549, and *Rex v. Gainer*, 7 C. & P. 231, were not decisions *on the form of the

*886] indictment or conviction, but on the proof required. If the words of the statute have the meaning contended for on the other side, it will of course follow that the proof must have gone as far, for the words of this indictment or conviction must then be understood in the same way; and the objection to this conviction will disappear. In *Rex v. Barham*, 1 Moo. C. C. 151, (commented upon by Mr. Greaves in his edition (3d) of Russell on Crimes, vol. i. p. 479,) the indictment contained the word "there;" but the question was as to the proof. The language of the conviction here is scarcely consistent with the meaning that the defendant did not intend to take game in the close into which he had entered: if it were averred that a man went into Suffolk to kill game, it surely would be taken for granted that he went there to kill game in Suffolk. The ordinary meaning of words should be given to "there," according to the principles laid down in the judgment of the court in *Rex v. Stevens*, 5 East, 244, 260. *Davies v. The King*, 10 B. & C. 89, was decided merely on the collocation of the words, which were so arranged that neither of the offences was described according to the language of the statute. That is the effect attributed to the decision in Dickinson's Guide to the Quarter Sessions, p. 384, 6th ed.

Gunning was heard in reply.

Cur. adv. vult.

LORD DENMAN, C. J., in this vacation, (February 12th,) delivered the judgment of the court.

*867] Many important matters were discussed on this *argument; but there is only one point to which we find it necessary to advert.

The defendants' plea cannot be supported unless the conviction is good in law. The plaintiff contends that it is invalid for want of setting forth that he entered the close with intent to kill game *there*. The defendants'

learned counsel, indeed, admitted that the conviction, as laid, could only have been proved by evidence of the intent to kill game *there*. But he urged that a statement in the conviction of the offence in the terms of the act creating it was sufficient, though more might be necessary to be proved by the evidence. This proposition is undoubtedly too extensive.

The rule laid down in Paley on Convictions, p. 108, 3d ed., that it is sufficient to follow the words of the act unless the offence be of a complicated nature, is open to two objections. It does not rest on any authority; nor does it furnish any criterion by which the justice of peace or this court can discover what cases are thus complicated.

In favour of the more general proposition *Rex v. Marsh*, 2 B. & C. 717, was cited. But LITTLEDALE, J., there holds the contrary opinion, declaring that, "generally speaking," a conviction which follows the words of the act will be good; which is undoubtedly true, but imports that there are cases in which it would not. The decision there, which dispenses with the word *knowingly*, which justice seems to require in order to render the possession of game unlawful, is founded on the defendant's trade, and the duty imposed upon him by the act as a carrier.

In *James v. Phelps*, 11 A. & E. 483, S. C. 3 P. & D. 231, case for a malicious prosecution, *where the defendant had indicted the plain- [•888
tiff for felony in obstructing the works of a mine, some members
of the court expressed the opinion that an obstruction not wilful or with
knowledge could not amount to a felony, from the general principles of
criminal justice. This I well remember, though the words are not reported
in Adolphus & Ellis or Perry & Davison. But *Regina v. Corden*, 4 Burr.
2279, is a distinct and pointed authority for the proposition that the words
of the act are not universally all that must appear on a conviction. There
the charge was for fishing in a pond. It was held naught, for want of
negation of the owner's consent. The same argument which is here resorted
to would have supplied that defect, and was pressed on the court; who
said, (4 Burr. 2282,) however, "The offence intended in this conviction is
fishing in the fishery of Mr. Hayne, being private property. But all this
might be done, for aught that appears upon this conviction, with the consent
of the owner. The fact ought to appear, so that the court may be able to
judge whether the conviction be agreeable to law. If the owner had been
the complainant, that would have shown his dissent: but this conviction
is upon the complaint of Martha Buxton; and it does not appear that the
defendant has been guilty of fishing in any water being private property,
without the consent of the owner." As in that case the consent of the
owner was required to be negatived in the conviction, so in the present the
necessity of its alleging an intent to kill game *there* is deduced from the
enormous consequences which would otherwise follow. For it cannot be
disputed that this omission would leave any man *open to a sum- [•889
mary conviction, as an offender against stat. 9 G. 4, c. 69, s. 1, who
should enter the land of another at an early hour, during that period which

the statute defines as the night time, with the intent to pass over each land in order to arrive at preserves of his own, and there shoot his own pheasants.

The conviction states, in the terms of the act, that the plaintiff entered the close *unlawfully*. But we do not know in what sense that word is used. The justices of peace may have thought it unlawful to enter any close with the remotest purpose of killing game; or they may possibly mean that the entry was unlawful as a trespass on the land of another. If such was their meaning, we apprehend that the fact ought to have been averred; and, if that ground of illegality was held essential to the offence, the decision in *Regina v. Corden*, 4 Burr. 2279, would prove that the absence of the owner's consent ought also to be averred.

Two cases, which occurred at the assizes before two of my learned brethren, were cited, *Rex v. Gainer*, 7 C. & P. 231; *Regina v. Davis*, 8 C. & P. 759. In the former, the indictment, framed on sect. 9 of the same act, alleged that three defendants entered a wood, armed, with intent to kill the game there. My brother COLERIDGE held that the strict proof of that precise intent was requisite, observing that, though they intended to kill game in every other cover in the county, that indictment would not be proved. It was not holden, or even argued, that the word *there* could be rejected as surplusage. The other case occurred before my brother PATTERSON, who held, in the first place, that the arming of one of the party was

*not the arming of all, so as to satisfy an indictment on the same
 *890] section. This alone secured the defendants' acquittal; and there was no absolute necessity for inquiring whether the intent must be to kill game in the place entered. But the learned judge pointed out the deficiency of such proof as fatal to the prosecution. There are, however, strong reasons for dispensing with such intent in the description of the misdemeanor, which do not apply to the offence, made the subject of summary conviction. In the former case, the mischief against which the act would appear to be chiefly directed is the danger to the public peace produced by the assemblage in the night of armed numbers in pursuit of game. The place where the game is to be killed is wholly immaterial for the constitution of this misdemeanor: and it is not impossible that these cases may deserve more consideration. But, when the thing denounced by law is the entry of a close for the purpose of killing game, the words of themselves would convey to every ordinary reader the impression, though they do not necessarily purport, that the intention is to kill game there; and the probable result of not so restricting the sense of the clause has been already pointed out as too monstrous to have been contemplated.

The learned counsel, indeed, admitted on the argument that the sense ought to be so restricted, and that it is in fact so restricted by the very words employed; and hence that the omission objected to makes no difference. A doubt was felt on the bench whether this admission was not too large. On reflection we think it right, and that it depends on the principle of

former cases, that, where a certain act is made punishable by summary conviction, which act may be lawful if performed *under certain circumstances, these circumstances ought to be negatived in the [*891 conviction.

None of us doubt that, where the proof must negative such circumstances, the allegation in the instrument of conviction ought to do the same. This principle is well expressed, on a similar though not exactly the same occasion, in *Rex v. Baines*, 2 Ld. Raym. 1265, 1269. "And proceedings in cases of this nature, which are to deprive a man of his freehold in a summary way, without letting him be tried by his peers, are always construed strictly, and never supplied by intendment of matter which don't appear on the face of them."

Our judgment must be in favour of the plaintiff.

Judgment for plaintiff.

FINDON v. M·LAREN. Feb. 1.

To a plea in trover for a carriage, alleging that it was taken on the premises of B. as a distress for rent due from him, plaintiff replied that B. was a coachmaker and a commission agent for the sale of carriages, and exercised that trade on the said premises, and was employed by plaintiff, in the way of his said trade and business, for certain commission, to expose for sale and sell the carriage on the said premises, and plaintiff had delivered the carriage to B. for the purpose that he might there expose for sale and sell the same for plaintiff in the way of his said trade and business for certain commission, and B. had the same on the premises for that purpose, and the same remained thereon to be managed, and dealt with, sold and exposed for sale, as aforesaid, in the way of B.'s said trade and business, and not otherwise, until the time of the distress.

Held, that goods in the hands of a commission agent for sale in the way of his business are exempted from distress; and (on special demurrer) that the exemption was here sufficiently pleaded.

TROVER for a certain carriage called a cab, and for a cab head thereto belonging.

Last plea. That defendant, as bailiff of Edmund Lee, took the goods, on premises situate, &c., as a distress for rent of the said premises, then due to Lee from John Bailey, his tenant thereof. Verification.

*Replication. That, before and at the time of the making of the distress, the said John Bailey was a coachmaker and a commission [*892 agent for the sale of coaches and carriages for a certain commission and reward to him therefore paid, and the trade and business of such commission agent then in and upon the said dwelling-house in the last plea mentioned exercised and carried on. And, the said J. B. being such commission agent as aforesaid, the plaintiff, shortly before the said time when, &c., to wit on, &c., did employ the said J. B. in the way of his said trade and business, for certain commission in that behalf, to expose for sale and sell in the said dwelling-house the said cab and cab head; and for that purpose the said plaintiff, to wit on, &c., had sent and delivered to the said J. B. the said cab and cab head for the purpose that the said J. B. might, in the

said dwelling-house, expose for sale and sell the same for the plaintiff in the way of his the said J. B.'s said trade and business for certain commission and reward to the said J. B. payable in that behalf; and the said J. B. then had and received the said carriage for the purpose aforesaid in and upon his said dwelling-house and premises, and the same remained and continued thereon to be managed and dealt with, and sold and exposed for sale, as aforesaid, in the way of his the said J. B.'s trade and business, and not otherwise, or for any other purpose whatever, from thence and until the making and levying of the said distress. That, whilst the said cab and cab head were in and upon the said dwelling-house and premises for the purpose aforesaid, and before the same or either of them were sold or otherwise disposed of by the said J. B. in the way of his said trade and business, and before a *reasonable time for that purpose had elapsed, *893] the defendant, to wit at the said time when, &c., of his own wrong seized, &c., and converted, &c., which is the said grievance in the declaration mentioned, in manner and form, &c. Verification.

Demurrer, assigning for causes: That the replication does not state or show, nor can it be collected therefrom, that the said trade and business of a commission agent, carried on by J. B. as in the replication mentioned, was a public trade, or that it was a trade ostensibly or otherwise carried on by him for the benefit of the public, or one in which the public was interested, nor that it was a trade which required, or in the carrying on of which the said J. B. professed or was accustomed to, or in which it was usual to, receive coaches and carriages into the possession of the said J. B., or to expose them for sale on his premises, or that the said dwelling-house was the place in which the said J. B. did in fact, or in which he professed or was known to, carry on the said trade and business, or that it was the place in which coaches and carriages were exposed for sale by him in the way of his said business; and also for that the said replication ought to have explained in what the trade and business of a commission agent consisted, and have shown that persons exercising the same were accustomed to receive the goods of other persons into their possession for the purpose of sale. And also that the allegation that J. B. was a coachmaker is unnecessary to the replication and improper, and one which, taken in its connection in the said replication, tends to mislead the jury, &c. And that it is consistent with the allegation in the said replication that the sale of coaches and *894] carriages on commission, as *carried on by J. B., was not the public or ostensible trade and business of the said J. B., but was merely ancillary and subordinate to his trade of a coachmaker, and exercised only in a private manner and to a limited extent; and the allegation that he was a commission agent for the sale of coaches and carriages for a certain commission, &c. would be satisfied by proof that he acted as such in a few instances, although it was not his professed or ordinary calling. And also that the said replication does not allege that J. B., at the time of the said distress, carried on in the said dwelling-house the trade and business of *

commission agent. And also that the replication is ambiguous, and fails to show distinctly and explicitly whether the trade and business of the said J. B. consisted in making or in selling coaches and carriages, or that he carried on such trade in such a way as that the said cab and cab head would be, under the circumstances, privileged from distress, or whether the same were received, or whether they were, at the time of such distress, on the said premises for the purpose of being managed and dealt with by the said J. B. as a coachmaker or a commission agent, or both.

Joinder in demurrer.

Lush, for the defendant. The principles on which cases of this kind must be decided are laid down, and the authorities reviewed, in *Muspratt v. Gregory*, 1 M. & W. 633, S. C. Tyr. & G. 1086; (a) and, both in that case and in *Joule v. Jackson*, 7 M. & W. 460, it was the opinion of the courts that the exemptions already *recognised were not to be extended. The only class of exemptions applicable here, among [895 those stated in *Simpson v. Hartopp*, Willes, 512, 514, (b) is the second, consisting of "things delivered to a person exercising a public trade to be carried, wrought, worked up or managed in the way of his trade or employ." [WIGHTMAN, J. What do you say is meant by a "public trade?"] The party must hold himself out to the public as exercising it. They must know that the trade consists in receiving into possession the goods of other persons. In *Gilman v. Elton*, 3 Brod. & B. 75, it was held (for the first time) that goods in the hands of a factor for sale were exempt from distress; but a factor is publicly known to be a person who receives goods for that purpose. And in *Adams v. Grane*, 1 Cro. & M. 380, S. C. 3 Tyr. 326, property on the premises of an auctioneer employed to sell it was held to be privileged; but the same remark applies to that case. Lord LYNCHBURST, C. B., there referred to *Gilman v. Elton*, and said that "the principle which applies to the case of an ordinary factor, applies equally to the case of an auctioneer." BAYLEY, B., expressed himself to nearly the same effect. [WIGHTMAN, J. Do not the same observations apply to the business of a commission agent for the sale of carriages?] A factor, or an auctioneer, is known to have goods of other persons on his hands for sale: but the law does not know that in the case of a commission agent; and the replication here does not state it. [WIGHTMAN, J. An auctioneer very often has not the goods for sale on his premises.] If he has them there, *the public know that they are on the premises for sale. [WIGHTMAN, J. [896 It is the same when they see a carriage in the rooms of a commission agent.] Unless it is the known usage of the trade that goods should be on the premises for the purpose of sale, they are not privileged. The averments here do not furnish any thing equivalent to the allegation of such knowledge.

(a) Judgment affirmed on Ex. C., *Muspratt v. Gregory*, 2 M. & W. 677. See *Gibson v. Iveson*, 3 Q. B. 39.

(b) See S. C., as *Simpson v. Harcourt*, in the judgment of Buller, J., in *Gorton v. Falkner* 4 T. R. 568. Also *Gisbourn v. Hurst*, 1 Salk. 249, where the court uses nearly the same words.

It is stated that the goods were sent to Bailey for the purpose that he might, in the said house, "expose for sale and sell the same for the plaintiff in the way of his the said J. B.'s said trade and business for certain commission," and that they remained on the premises "to be managed and dealt with, and sold," &c., "as aforesaid, in the way of his the said J. B.'s trade and business" at the time of the distress; but these allegations do not supply the want of an averment that Bailey was accustomed to receive goods for the purpose described. The term "commission agent" is not the subject of any known legal definition, as "broker" or "factor" is: and the course of business with such an agent is not understood by the court unless described. Further, the replication states Bailey to have been a coachmaker as well as a commission agent; if he merely, as a coachmaker, permitted the carriage of a customer to stand on his premises for the purpose of being sold, it was not privileged: the replication does not exclude that view of the case; and it lies upon the plaintiff to make the exemption clear.

Hoggins, contra, was stopped by the court.

LORD DENMAN, C. J. I think this comes within the principle of the auctioneer's case.

*897] *PATTESON, J. The principle of exemption has been applied to different cases from time to time, according to the existing state of trade. This is observed in the judgment of BAYLEY, B., in *Adams v. Grane*, 1 Cro. & M. 380, S. C. 3 Tyr. 326. And here, the purpose for which the goods are stated to have been placed with the commission agent brings the case within the exemption.

WIGHTMAN, J.(a) It is distinctly stated here that the plaintiff sent the cab to Bailey in order that he might expose for sale and sell the same in the way of his said business for commission and reward, and that Bailey had and received the same upon his premises for that purpose, and the same remained thereon to be managed, dealt with, sold and exposed for sale as aforesaid by Bailey in the way of his said trade and business, that is, of a commission agent. The case comes directly within that of the auctioneer.

Judgment for plaintiff.

(a) Coleridge, J., had left the court.

*IN THE EXCHEQUER CHAMBER.

[*898

(Error from the Queen's Bench.)

CLARKE v. The Company of Proprietors of the LEICESTERSHIRE and NORTHAMPTONSHIRE Union Canal. Feb. 1.

On demurrer to a traverse of the return to a mandamus, the defendant may impeach the validity of the writ.
So held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench.

MANDAMUS, calling upon the company to establish a uniform rate of tolls along the whole line of their canal, or to equalize (as in the writ was specified) the rates(a) on coals and coke carried on the canal navigation from Leicester to Market Harborough, and from Leicester to Gumley. The company made a return; and the prosecutor pleaded three pleas traversing matters of fact alleged in the return. To each of these the company demurred. The ground of demurrer stated on the paper books was that the company are not bound under their acts of parliament, (33 G. 3, c. 98; 45 G. 3, c. lxxi., local and personal, public, and 50 G. 3, c. cxxii., local and personal, public,) or otherwise, to make an equal rate. The prosecutor joined in demurrer, praying judgment and a peremptory writ.

The demurrer was argued in the Court of Queen's Bench, in Michaelmas term, 1841,(b) by *Manning*, *Serjt., for the defendants, and *Peacock* for the crown. *Peacock* contended that the defendants must be taken to admit on the record that they had made a false return; and, having done so, they could not argue, as they proposed in effect to do, that the mandamus was bad. He also discussed the substantial question raised by the pleadings. [*899

In Hilary term, (January 19th,) 1842, Lord DENMAN, C. J., delivered the judgment of the court, in which, after stating the ground of the demurrer to be "that, supposing the facts stated by the prosecutor in his traverse to be admitted, enough appears in the return unanswered to prevent him from having the peremptory writ," and after observing that "this depends on the construction of the first and last of the acts of parliament," he proceeded to show that the acts did not warrant imposing either of the alternatives stated in the mandamus: and judgment was given for the defendants.

The words of adjudication were "that the said several pleas and traverses of the said Thomas Clarke by him firstly, secondly and thirdly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said T.

(a) See general regulations on this subject, introduced by stat. 8 & 9 Vict. c. 28.

(b) November 10th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

Clarke to have a peremptory writ of mandamus in this behalf;" and it was considered that the defendants should depart without day, and should recover against T. Clarke the sum, &c., for their costs by them laid out, &c., in defending their suit in this behalf, according to the form of the statute, &c.

Error was brought in the Exchequer Chamber; and the defendants joined in error. The case was argued in Hilary and Easter vacations, 1843.(a)

Peacock, for the crown, contended that the traverse to a return, under stat. 9 Ann. c. 20, s. 2, was analogous to an action for a false return, in which action the validity of the mandamus could not be questioned; *Green v. Pope*, 1 Ld. Ray. 125, 126: that the regular course, if the defendants objected to the mandamus, would have been to move for a concilium: in that case, if they had succeeded, the costs would have been in the discretion of the court, whereas, on demurrer, the party succeeding is entitled to costs absolutely by stat. 9 Ann. c. 20, s. 2; so that, if the defendants were let in to question the mandamus in this state of the pleadings, they would gain an advantage by having made a false return. [PARKE, B. If the writ is bad, can we award a peremptory mandamus?] Stat. 9 Ann. c. 20, s. 2, enacts that the prosecutor, if successful, shall recover his damages and costs, as in an action for a false return, "and a peremptory writ of mandamus shall be granted without delay, for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient."(b) But the peremptory mandamus is no part of the judgment of this court; the judgment here would be only "quod recuperet," and it would be for the Court of Queen's Bench to decide, if the cause were remitted to them, whether a peremptory mandamus should issue or not. *Rex v. The Margate Pier Company*, 3 B. & Ald. 220, may be cited for the defendants: but the question there did not arise on a traverse; and *Green v. Pope* was not cited. (He also contended, on the principal ground of objection, that the mandamus was good.)

Manning, Serjt. contrà, contended that this was a correct mode of bringing the validity of the writ before the court; and he stated that the pleadings had been shaped by the defendants for the express purpose of taking the opinion of a court of error on this point, in the event of the Court of Queen's Bench holding the writ good; and that, unless the writ was good, a peremptory mandamus could not issue. He observed that *Green v. Pope* was not strictly in point, the question there having arisen in an action in the Common Pleas for a false return. It did not appear in that case that the mandamus would not have been held good, if discussed. *Manning* also relied upon *Rex v. The Margate Pier Company*.

Peacock was heard in reply.

Cur. adv. vult.

(a) February 1st and 2d, before Tindal, C. J., Erskine and Cresswell, Js., and Lord Abinger, C. B., Parke, Alderson, and Rolfe, Bs. May 12th, before Tindal, C. J., Erskine and Cresswell, Js., and Parke, Alderson, and Rolfe, Bs.

(b) See as to this clause, *Regina v. Governors of Darlington School*, ante, 682, 719.

TINDAL, C. J., now delivered the judgment of the court.

This was a writ of error upon a judgment given by the Court of Queen's Bench in favour of the defendants. The prosecutor had sued out a mandamus, directed to the Canal Company, commanding them to make an uniform rate of tolls along the whole line of the canal described [*902 in the mandamus, or that they should demand and take only the certain amount of toll therein also specified. To this mandamus the defendants had made their return; and the prosecutor had traversed several of the facts stated in such return. And, upon a demurrer to the traverse, the Court of Queen's Bench have given judgment for the defendants upon the ground that the matter disclosed in the writ itself was insufficient to support such writ. Upon the argument before us it was objected on the part of the plaintiff in error that at this stage of the proceedings it was not open to the defendants to fall back upon the writ of mandamus and rely upon any insufficiency of the writ itself; and the case of *Green v. Pope*, 1 Ld. Raym. 125, 126, was relied upon as an authority for that point. The case cited, however, differs entirely from that which is before us. The case cited was that of an action brought in the Court of Common Pleas for a false return to a mandamus issued out of the king's bench: and all that is observed by the court upon that objection being made was, that the question whether a mandamus would lie or not was not before the court, for that it must be taken pro confesso that the mandamus had been granted and that a false return had been made, and in that case the plaintiff would have been entitled to damages only, not to a peremptory mandamus, as he would have been if an action had been brought in the King's Bench; in which court, however, if the first mandamus was defective, no peremptory mandamus would have gone. But here we are called upon to say whether the Court of Queen's Bench had authority to grant the mandamus which is set out upon the record itself: and the case of *Rex v. The Margate Pier Company*, 3 B. & Ald. 220, (a) [*903 we think a decisive authority that such question may be raised in any stage of the proceedings. And, upon the question whether the writ of mandamus does or does not upon the face of it disclose a legal ground of complaint, as we agree in the conclusion at which that court has arrived, it will be unnecessary to do more than to state shortly the view we take of the mandatory part of the writ when compared with the provisions of the statutes on which it professes to be founded.

(His lordship then discussed the clauses of the mandamus, and stated the opinion of the Court of Error, concurring with that of the court below.)

We therefore think that, by reason of the insufficiency of the writ, judgment should be given for the defendants in error.

Judgment affirmed.

(a) See *Regina v. Ledgard*, 1 Q. B. 616.

*904]

*DUNCAN v. LOUCH. Feb. 4.

Case for obstructing a right of way between two specified termini over a close called the Terrace Walk. The way was claimed as appurtenant to a messuage, in general terms, without reference to any obligation to repair. On the trial of an issue joined on a traverse of the right of way, the easement proved was a right to pass forwards and backwards over every part of the close, and not merely between the termini specified in the declaration; and it was shown that the easement was enjoyed under a grant thereof to D., his heirs, tenants, and assigns, and to certain other persons, "he, they and every of them, from time to time, contributing and paying a ratable share and proportion towards repairing and amending the Terrace Walk."

Held no variance, the easement proved being only larger than the easement alleged, and not different in kind.

Held, also, that the obligation to repair was not in the nature of a condition precedent, and need not be alleged in the declaration.

The easement was granted in 1675; there was evidence that, for ten years next before the commencement of the action, part of the way claimed had become public.

Held, not necessary to state in the declaration that such part had become public.

CASE. The first count stated that plaintiff, before, &c., was, and still is, lawfully possessed of a certain messuage, &c., and by reason thereof, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from and out of the said messuage, &c., unto, into, through and over a certain street, &c., called Buckingham street, and from and out of the said street, through a certain iron gate there, unto, into, through, over and along a certain close, situate, &c., called Terrace Walk, and from and out of the said last mentioned close unto and into a certain erection or building called the Water Gate, and so back again, from and out of the last mentioned erection, &c., unto and into the said close called the Terrace Walk, as aforesaid; and from and out of the said last mentioned close, through the said iron gate, unto, into, through and over the said street called Buckingham street, as aforesaid, unto and into the said messuage, so in the possession of plaintiff, to go, return, pass and repass on foot, at all reasonable times of the day, at his free will and pleasure, as to the said messuage, &c., appertaining; yet defendant, well knowing, &c., but wrongfully contriving, &c., whilst plaintiff was so possessed, &c., to *wit on, &c., *905] and divers other days, &c., and at all reasonable times of the day, wrongfully, &c., caused and procured the said iron gate to be locked, chained and fastened, and kept and continued, &c., to wit, from thence hitherto, and put up rails, &c., and kept and continued, &c.; and thereby during all the time aforesaid the said way was and still is greatly obstructed; and plaintiff by means thereof could not, during the time aforesaid, &c., nor can he now, have or enjoy his said way as he of right ought to have done, &c.

The second count claimed the same right of way as in the first count, with the addition of a right of going through the Water Gate into and upon a certain public and navigable river there, to wit the river Thames, and back again.

The third count claimed a similar right of way as in the first count, unto and into the western portion of the Water Gate.

Fourth count. That plaintiff, before and at the time, &c., was, &c., and still is, possessed of another messuage, &c.; and by reason thereof plaintiff, during, &c., ought to have had and still of right ought to have the free liberty, &c., for him, his heirs, tenants or assigns, with others the inhabitants of certain premises called the York House and the grounds thereof, of passing and repassing on foot, at all reasonable times of the day, from and out of the last mentioned messuage, &c., unto and into Buckingham street, and from and out of the last mentioned street unto and into a certain close called the Tarris Walke, and of walking there, and of passing and repassing into and upon a certain erection, &c., called the Water Gate, next the river of Thames, at his and their free will and pleasure, as to the said last mentioned messuage, &c. appertaining; yet defendant, &c., on, &c., wrongfully placed, &c., posts, &c., before and at the entrance [906 of the Water Gate, and thereby prevented plaintiff from entering the same, and kept and continued, &c.

Fifth, sixth and seventh counts. The fifth and seventh were similar to the first and third, but claimed the right of way from the messuage on to the Terrace Walk, without mentioning Buckingham street: the sixth count was the same as the seventh, except that it claimed the right with respect to the eastern, instead of the western, portion of the Water Gate.

First plea, to all but the third and sixth counts, Not guilty. Issue thereon.(a)

Second plea, to the first count, traversing the right of way claimed in that count. Issue thereon.

Third plea, to the first count, that plaintiff was not possessed of the messuage. Issue thereon.

Fourth plea, to the second count, traversing the right of way claimed in that count. Issue thereon.

Fifth plea, to the second count, that plaintiff was not possessed of the messuage. Issue thereon.

Sixth plea, to the fourth count, traversing the liberty in that count alleged. Issue thereon.

Seventh plea, to the fourth count, as to the placing one of the gates before the Water Gate: that the grievances were committed after the passing of an act, 29 G. 2, c. 90, "to enable the proprietors and inhabitants of houses in York Buildings," &c., "to make and levy a rate on themselves, sufficient to answer the expense of rebuilding or repairing of the Terrace Walk and Water Gate," &c., "and for keeping the same in repair [907 for the future:" that a committee (appointed as was stated in the plea) of inhabitants, &c., being trustees for executing the act, set up the gate to prevent nuisances, &c.: and that an officer called the terrace keeper,

(a) The issues on the first, third, fifth, seventh, eighth, tenth, and twelfth pleas were not material, those pleas being abandoned at the trial.

appointed by the trustees, always had a key of the gate for the use of plaintiff, &c., as often as he or they have had occasion to pass, &c., and hath always unlocked, &c., as often as requested. Verification. Replication, traversing the nomination and appointment of the trustees. Issue thereon.

Eighth plea, to the fourth count, that plaintiff was not possessed of the messuage. Issue thereon.

Ninth and tenth pleas, to the fifth count, and eleventh and twelfth pleas, to the seventh count, respectively traversing the right of way and the plaintiff's possession of the messuage, &c., in those counts respectively mentioned. Issues thereon.(a)

On the trial, before WIGHTMAN, J, at the Middlesex sittings after Hilary term, 1844, it appeared that the plaintiff was the owner of the house No. 15, Buckingham street, Adelphi, abutting upon the Terrace Walk, and that he claimed the right of way set out in the declaration as appurtenant to the house, which he purchased in 1836. He proved a user of the way claimed ever since that time; he also proved that he was the representative, in respect of the said house, of one Philip Doughty, and put in a grant, dated March, 1675, containing the following words. "Together with the free liberty, use, benefit and privilege, for him the said Philip Doughty,

*908] his heirs, tenants or assigns, with *other the inhabitants of York House and grounds, of the Tarris Walke of the Water Gate next the river of Thames, he, they and every of them, from time to time, contributing and paying a ratable share and proportion towards repairing and amending the same, with others who shall have the benefit thereof," &c. It was not shown that the plaintiff had ever been called on to contribute towards the repairs, or that any repairs had been required. In 1675, Buckingham street was not built. The property in the Terrace Walk was, by stat. 29 G. 2, c. 90, vested in trustees for the purpose of raising a fund for keeping it in repair. No evidence was given in support of the seventh plea. It appeared that Buckingham street had, for the last ten years, been used as a public highway; but there was no evidence of its having been so used at any earlier period. It was argued, for the defendant, that the right of way claimed by the plaintiff in the first, second, and fourth counts was merged in the public way across Buckingham street, and that those counts were therefore not supported. The learned judge was of that opinion, and directed a verdict for the defendant upon the issues on the second, fourth, and sixth pleas, reserving leave to the plaintiff to move to enter a verdict thereon. It was also objected that the right proved was not a right of way, but a right to use the walk for pleasure only, and was therefore improperly stated in the declaration; and, further, that the grant was conditional only upon the grantee's contributing to the repairs, and therefore that the plaintiff ought in his declaration to have averred performance of the condition. The learned judge overruled these objections, but reserved

(a) There was a thirteenth plea, to the third and sixth counts, and an issue thereon, not material here, on which the defendant had a verdict.

leave to the defendant to move to enter a verdict upon the issues raised upon the ninth and eleventh pleas, on which, and also on the issues raised on the first, *third, fifth, seventh, eighth, tenth and twelfth pleas, [°909 the verdict was for the plaintiff.

In Easter term, 1844, *Platt* obtained a rule to show cause why the verdict on the issues raised upon the fifth and seventh counts should not be entered for the defendant; and Sir *W. W. Follett*, solicitor-general, obtained a rule to show cause why the verdict on the issues raised on the first, second and fourth counts should not be entered for the plaintiff.

Ogle now showed cause against the defendant's rule. The grantee of a right of way, granted on condition that he keeps the way in repair, is not, in pleading the right of way against a wrong-doer or mere stranger, bound to show the condition, but may claim the right generally: and it appears from 1 Chit. *Pleading*, 395, 7th ed. 1844, that he may do so even in declaring against the owner of the soil. In practice the grantee never does set out such a condition in declaring against a stranger, though the obligation of keeping the way in repair, in the absence of express provision for repair, falls upon the grantee and not upon the grantor; as it is said in *Pomfret v. Ricroft*, 1 Saund. 322: "As in the case where I grant a way over my land, I shall not be bound to repair it, but if I voluntarily stop it, an action lies against me for the misfeasance." And Mr. Serjt. Williams, in note (3) on this passage,^(a) after observing that the principle is recognised in *Taylor v. Whitehead*, 2 Doug. 745, 748, proceeds, "For by the common law, he who has the use of a thing, as in this case the grantee of a way, ought to repair it." [COLERIDGE, J. That is not a condition incident by law to the grant of a right of way; it is not even an obligation to which the *grantee is subject; it is no more than this, that, if he wants the way to be repaired, he must repair it himself.] There is [°910 nothing in the present case to show that the plaintiff was liable to repair. That question never arose; for the defendants abandoned their special plea to the fourth count. That plea was founded on stat. 29 G. 2, c. 90; and no evidence was offered to support the affirmative of the issue taken on the traverse in the replication. As the case now stands, it does not appear that the way was out of repair, nor that the plaintiff had ever been called on to contribute to repairs.

The defendant also contends that this is not a right of way at all, but a mere privilege for the plaintiff, like the other tenants, to walk on the terrace, contributing also, like them, to the repairs. What is the easement granted by the deed but a right of way? How otherwise could it be described in pleading? Besides, the evidence of user is such as entitles the plaintiff to a verdict independently of the deed.

Peacock, contra. If this be a right of way, it is a right only of using the way for the purpose of passing from terminus to terminus, and not of walking for pleasure between the intermediate points. But the right is in fact

(a) 1 Wms. Saund. 322, c. 6th ed

one of a kind altogether different. It is like the privilege which the builder of a square, who reserves the centre for a garden common to all the houses, grants to the owners and tenants of the houses of walking about the garden on condition of keeping it in order. [COLERIDGE, J. The allegation may be smaller than the proof. Has not the inhabitant of the square a right to cross the square, included in his right to walk about the square?] If that be so, each inhabitant is entitled to repair the terrace walk; *Pomfret* *911] v. **Ricraft*, 1 Saund. 321. [COLERIDGE, J. He would, but for the stipulations in the local act, vesting both the property and the right to repair in trustees.] The privilege actually vested in the plaintiff, according to his case, does not extend to such a right of way as he has claimed: it is a right of a different kind. One who has a right of way over my land to close A. may not use it as a way to close B. [Lord DENMAN, C. J. The right as pleaded is unlimited, to walk, pass and repass at his and their free will and pleasure; there is nothing said about the particular occasions of walking: that is an exact description of the use which parties make of such a terrace. WIGHTMAN, J. Does it not come to this, that he has a right of way over every part of the land in question?](a)

Secondly, the grant of the right was conditional, and the condition ought to have been set forth in the declaration; the defendants might then have pleaded non-performance. Thus, in covenant against a lessee for not repairing, under a covenant by him to repair, the lessor allowing and assigning him timber for the repairs, the lessor must aver in his declaration that he was ready to allow and assign him timber sufficient for the purpose; *Thomas v. Cadwallader*, Willes, 496. The distinction taken in that case between mutual covenants and conditional grants is considered in *Platt on Covenants*, Part I. ch. 2, sect. v.(b) It is there said, p. 75, "Further, if a lessee for years covenants to repair, provided always, and it is agreed that the lessor shall find great timber, &c.; this makes a covenant on the part of the lessor to find great timber, by the word *agreed*; and it will not be a qualification *of the covenant of the lessee. But if the lessee cove- *912] nants to repair, provided always that the lessor shall find great timber, without the word *agreed*, this proviso shall not make any covenant on the part of the lessor, but it shall be only a qualification of the covenant of the lessee." Here there is not the word "*agreed*," nor any other word of covenant, so that if this is not a condition, the trustees have no means of compelling the plaintiff to contribute to the repairs. [PATTESON, J. Do you say he ought to have averred that he was always ready and willing to contribute?] Perhaps he ought; at all events he ought to have pleaded the right as belonging to himself and the other inhabitants, he and they contributing to the repairs. [COLERIDGE, J. That raises the question whether this, if a condition, was a condition precedent; if it was, the declaration must show performance or excuse non-performance. Suppose

(a) See *Elwood v. Bullock*, ante, pp. 383, 409.

(b) See also the cases collected at p. 37 of the same work.

the defendant to traverse the allegation of performance, would not such an issue be immaterial, as between the grantee and a stranger? **PATTESON, J.** This is very different from a right of way with a qualification that the party shall pay a penny every time he uses the way: there he may not use the way till he pays the penny.^(a) Here he can have to contribute to repairs only when repairs are necessary; in the mean time he has a right to use the way without paying any thing. This, therefore, is a condition subsequent.] The trustees would have no means of enforcing contributions. [**WIGHTMAN, J.** There is the word "paying;" would not that raise a covenant in law?] It is said in *Platt on Covenants*, p. 37, Part I. ch. 2, sect. ii., that an action will not lie where there is "a proviso only, and no express covenant. Here there is no covenant that would run with the land. [**WIGHT-** *913
MAN, J. Why should it not run with the land and the easement?] The grantor could not have sued for non-repair; and the trustees, who are strangers to the deed, have no means of enforcing contributions but by excluding the party till he contributes.

LORD DENMAN, C. J. I think there is no doubt in this case. Taking the right, as *Mr. Peacock* suggests, to be like the right of the inhabitants of a square to walk in the square for their pleasure, they paying the necessary rates for keeping it in order, I cannot doubt that, if a stranger were to put a padlock on the gate and exclude one of the inhabitants, he might complain of the obstruction, and a stranger would not be permitted to say that the plaintiff's right was only conditional. Such a question might arise under other circumstances, but not under the circumstances now before us.

PATTESON, J. I do not understand the distinction that has been contended for between a right to walk, pass and repass forwards and backwards over every part of a close, and a right of way from one part of the close to another. What is a right of way but a right to go forwards and backwards from one place to another? As to the other point, I cannot see any thing in this grant at all resembling a condition precedent. If repairs were to become necessary, and the grantee, being called upon to contribute, refused, I do not know whether that would or would not effect a forfeiture; but the liability is not such a qualification as need be alleged in this declaration.

***COLERIDGE, J.** The defendants have relied on two objections. First, that the plaintiff in his declaration has incorrectly described *914
his right as a right of way, whereas, in fact, it is a larger easement. There would be a good objection on the ground of variance if the easement claimed were inconsistent with, or different from, the easement proved; but, if, as in the present case, the thing granted is only larger than the thing claimed, and is not different in kind, it is well known that the allegation may be less than the proof, if the matter alleged be included in the matter proved. The other objection is, that the right claimed is imperfectly described in the declaration, inasmuch as it is claimed generally, whereas it is, in fact, conditional. That would be true only if the condition were precedent:

(a) See *Lovelace v. Reynolds*, Cro. Eliz. 548, 563; *Paddock v. Forrest*, 3 M. & Gr. 903.

but, if the condition here was precedent, the plaintiff must not only have set it forth in his declaration, he must also have pleaded performance or something rendering the allegation of performance unnecessary. Here the necessity for repairs may never have arisen. I think the obligation relied upon was not a condition precedent: whether it is a condition at all it is not necessary to determine.

WIGHTMAN, J. I also am of opinion that this rule must be discharged. The right proved in evidence is a right of passage backwards and forwards over every part of the close: the right claimed is less than this, but is included in it, being a right of way from one part of the close to another. That is not objectionable on the ground of variance. As to that which is called a condition, is it an obligation in the nature of a condition precedent, or of a condition subsequent? Clearly not of a condition precedent, for the reasons *915] stated by my brother COLERIDGE. And if it be in the nature of a condition subsequent, it is not necessary to aver it; *Gray's Case*, 5 Rep. 78 b. And "upon a trial, Newcastle Summer assizes, 1827, BAYLEY, J., left it to the jury, whether the payment of 1d. for horngeld was a condition precedent or subsequent to the enjoyment of the right, being of opinion that if it were the former it ought to be alleged;" *Anon.* note (m) to 3 Stark. Ev. 909, 3d ed., 1842.

Rule discharged.

Peacock then showed cause against the rule for entering a verdict for the plaintiff on the issues arising on the first, second and fourth counts. The way is claimed as a private way; but the evidence is that in part of its extent it is a public way: that is a misdescription. [PATTESON, J. The cases show that the acquiring a right of way by the public does not destroy a previously existing private right of way over the same line; but the private right of way must be previously existing: you cannot prove a private right by evidence of a public right.] There was no evidence of the private right having existed before the public right; that point was not even put to the jury. The declaration ought to have stated the right to be a right of way from the plaintiff's house to and over the public street, and from thence into the Terrace Walk.

Ogle, contra. It was clear, from the description in the deed, that, in 1675, Buckingham street was not a public street: and the only evidence of its having ever become a public street was the statement, by some of *916] the plaintiff's witnesses, that for the last ten or twelve years the public had used the privilege of walking up and down the street: the defendant then said that, the street having become a public street, the private right of way was merged: but it was never suggested that the private right of way had not existed previously to the public right of way. [WIGHTMAN, J. That was so. On the evidence there could be no doubt of the private way having existed before the public way.]

Lord DENMAN, C. J. The private way was granted in 1675: there was no evidence of a public way but for a very short period. We have no difficulty now in saying that, where a private way becomes public in part of

its course, it is not thereby rendered necessary, in pleading the private way, to state that part of it has become public.

PATTESON, COLERIDGE, and WIGHTMAN, Js., concurred.

Rule absolute.

*MARTIN v. WRIGHT. Feb. 4.

[*917]

Assumpsit on the following guarantee. "In consideration of your agreeing to supply goods to K. at two months' credit, I agree to guaranty his present or any future debt with you to the amount of 60*l*. Should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days from the date of receiving notice from you."

Held, that this was a continuing guarantee. And that, as to all the debts guaranteed, it was an agreement relating to the sale of goods, within the exemption in the Stamp Act, 55 G. 3, c. 184, Sched. Part I. *Agreement*.

ASSUMPSIT on a guarantee. Plea, (a) Non assumpsit. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the London sittings after Hilary term, 1844, the following guarantee was tendered in evidence by the plaintiff.

"Sir, In consideration of your agreeing to supply goods to Mr. F. Kilburn at two months' credit, we jointly and separately agree to guaranty his present or any future debt with you to the amount of 60*l*. Should he fail to pay at the expiration of the above credit, we hereby bind ourselves to pay you within seven days from the date of receiving notice from you. (Signed) John Wright. Elizabeth Kilburn."

The counsel for the defendant objected that the document was inadmissible for want of a stamp; but his lordship overruled the objection and admitted the evidence. The plaintiff then proved the supply of goods to Kilburn, subsequently to the guarantee: but it appeared that Kilburn had paid the plaintiff upwards of 60*l*. for goods supplied by him after the guarantee. The defendant's counsel then objected that the guarantee was not a continuing guarantee; but the lord chief justice held that it was. A verdict was given for the plaintiff, and leave reserved to move for a nonsuit on both the objections. In Easter term, 1844, *Charnock* obtained a rule nisi accordingly.

**IV. Payne* now showed cause. First: this is a continuing guarantee; *Merle v. Wells*, 2 Camp. 413; *Mason v. Pritchard*, [*918 2 Campb. 436, S. C., in banc, 12 East, 227; *Mayer v. Isaac*, 6 M. & W. 605. Secondly, the document was admissible in evidence without a stamp. The express exception in the stamp act, 55 G. 3, c. 184, Sched. Part I. *Agreement*, of agreements "made for or relating to the sale of any goods, wares or merchandise," has always been held to exempt guarantees of the payment for goods to be furnished to third persons. (b) It may perhaps be

(a) There were other pleas leading to issues on which no question arose before the court.

(b) See *Warrington v. Furber*, 8 East, 242.

contended that the word "debt," in this guarantee, means a debt for money: but the context shows that it means a debt for goods now or hereafter to be supplied.

P. McMahon, contra. As to the want of a stamp; the instrument shows that, before it was signed, there was a debt already in existence: and there is nothing on the face of the instrument to show that such debt had any thing to do with the sale of goods. Had the debt been for goods already supplied, the form of the instrument would have been "in consideration of your continuing to supply goods." It is clear that the introduction of additional matter not relating to the sale of goods takes the instrument out of the exemption; *Smith v. Cator*, 2 B. & Ald. 778; *Soath v. Finch*, 3 New Ca. 506; *Chanter v. Dickinson*, 5 M. & Gr. 253. Secondly, this is not a continuing guarantee. In the cases cited for the plaintiff on this point, the intention to give a continuing guarantee *was expressed *919] in plain terms; here nothing appears that can raise an inference that the guarantee was to cover more than a single credit of two months. The case is like *Melville v. Hayden*, 3 B. & Ald. 593; *Bovill v. Turner*, 2 Chit. 205; *Allnutt v. Ashenden*, 5 M. & Gr. 392; *Kay v. Groves*, 6 Bing. 276. The defendant ought not to be held liable on continuing transactions unless that intention be clearly expressed on the face of the instrument. In *Nicholson v. Paget*, 1 C. & M. 48, 54, S. C. 3 Tyrwh. 164, 169, *BAYLEY*, B., says: "It is not unreasonable to expect, from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee the extent to which he expects that the liability is to be carried." It must be admitted that in *Mayer v. Isaac*, 6 M. & W. 605, 610, 612, *PARKE*, B., and *ALDERSON*, B., threw some doubt on this rule of construction: but it is laid down in a considered judgment of the Court of Exchequer.

LORD DENMAN, C. J. There cannot be any doubt as to this guarantee being within the exemption in the Stamp Act. The consideration refers only to goods sold at a two months' credit; and there is nothing in any subsequent part of the instrument which can give to the expression "his present or any future debt with you" any more extensive meaning than that of a debt for goods sold. The expression "above credit" shows the intention of the parties to limit the guarantee to debts for goods sold at the above credit. The same *expressions which show this to be a *920] guarantee for goods sold show it to be a continuing guarantee, within the authority of the cases that have been cited.

PATTERSON, J. The words of this instrument are really very plain. No doubt the words "his present or any future debt" are large, and might include all debts accruing in the course of the dealings between the parties; but that expression is limited by the subsequent words, "should he fail to pay at the expiration of the above credit," which confine it to debts accru-

ing on the sale of goods at two months' credit. The plaintiff could not on this guarantee have maintained an action in respect of a debt for money lent.

COLERIDGE and WIGHTMAN, Js., concurred.

Rule discharged.

*IN THE EXCHEQUER CHAMBER.

[*92]

(Error from the Queen's Bench.)

NEWTON, Esquire, *v.* HOLFORD and Others. Feb. 4.

In trespass for breaking and entering plaintiff's house and assaulting his son, by means whereof plaintiff lost his son's service, the defendant may pay money into court under stat. 3 & 4 W. 4, c. 42, s. 21, the action not being "for assault and battery," within the excepting clause of the section.

So held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench.

TRESPASS. The first count of the declaration stated that defendants, with force and arms, &c., and with a strong hand, wrongfully and unlawfully forced and broke open the outer door of a certain dwelling-house of the plaintiff, in which he then dwelt and resided, called St. Paul's Cottage, situate, &c.; which said outer door, before and at the time of the forcing and breaking open of the same as aforesaid, was closed, locked and fastened, and not open; and defendants having so forced and broken open the said outer door as aforesaid, then wrongfully and unlawfully, with force and arms, &c., and with a strong hand, through the said door, when so forced and broken open, entered the said dwelling-house of plaintiff, and then made a great noise and disturbance therein, and staid and continued therein making such noise and disturbance for a long time, to wit for six hours then next following; and then forced and broke open, broke to pieces and damaged divers, to wit six, doors of the plaintiff, of and belonging to the said dwelling-house with the appurtenances, and broke to pieces, damaged and spoiled divers, to wit six, locks, keys, bolts, iron boxes, staples and hinges of and belonging to the said doors respectively, and wherewith the same were then fastened, of great value, to wit of the value of 50*l.* By means of which said several premises the plaintiff and his family were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the plaintiff; but also the plaintiff was thereby during all that time hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business. [*922]

2d count. That defendants, to wit on, &c., wrongfully and unlawfully, with force and arms, &c., and with a strong hand, forced and broke open the outer door of a certain other dwelling-house of plaintiff, then occupied

by him called, &c., situate, &c.; and defendants, with force and arms, &c., through the said door when so forced and broken open as aforesaid, the said door before and at the time of the said breaking open of the same being closed, locked and fastened, and not open, violently and unlawfully entered into the said dwelling-house of the plaintiff, and, then so being in the same, with force and arms, &c., therein assaulted Francis Robert Newton, then and still being the son and servant of the plaintiff, and then beat, bruised and ill treated the said F. R. Newton, insomuch that, by means thereof, he then became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit for one month then next following; during all which time plaintiff lost and was deprived of the service of his said son and servant, and of all the benefit and advantage which might and would otherwise have arisen and accrued to plaintiff from such service.

3d count. That defendants, to wit on, &c., violently, wrongfully and unlawfully, with force and arms, &c., and with a strong hand, forced and broke open a certain other outer door, to wit the back outer door of a certain other dwelling-house of plaintiff, then and still *in his occupation, called, &c., situate, &c., which said door, before and at the time when the same was so forced and broken open as aforesaid, was closed, locked and fastened, and not open; and the said defendants through the same door, so broken open as aforesaid, then, with force and arms, &c., entered the said dwelling-house of the plaintiff, and, so having entered the same, wrongfully and unlawfully, with a strong hand, and with force and arms, broke and entered a certain close of the plaintiff, being the curtilage of the said dwelling-house thereunto adjoining and situate, and being in the parish aforesaid in the county aforesaid, and then stayed and continued in and upon the said curtilage of the plaintiff making a great noise and disturbance therein for a long time, to wit for the space of six hours then next following; and then, with force and arms, to wit, &c., assaulted William Philip Newton, then and still being the son and servant of the plaintiff; and then beat, bruised and ill treated the said W. P. Newton, insomuch that, by means thereof, he then became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit for one month then next following; during all which time plaintiff lost and was deprived of the service of his said son and servant W. P. Newton, and of the benefit and advantage which might and would otherwise have arisen and accrued to him the plaintiff from such service; and by means of which premises the plaintiff and his family were, during a long space of time, to wit for six hours on the said 5th day of July in the year aforesaid, greatly disturbed and annoyed in the peaceable possession of the said curtilage of the said dwelling-house of the plaintiff, and of all the benefits and advantages which might *and otherwise would have arisen and accrued to him from the peaceable possession, use, occupation, and enjoyment of his said curtilage: and other wrongs, &c.

Plea, that plaintiff ought not further, &c., because defendants now bring into court the sum of 2*l.*, ready to be paid to plaintiff; and defendants further say that plaintiff has not sustained damages to a greater amount than the said sum of 2*l.* in respect of the causes of action in the declaration mentioned. Verification.

Replication, Damages ultra. Conclusion to the country. Issue thereon.

On the trial, before TINDAL, C. J., at the Gloucester Summer assizes, 1844, the jury found that the plaintiff had not sustained damage to an amount exceeding 2*l.* Verdict for defendants. In the ensuing term, (November 6th, 1844,)

Newton, in person, moved for a rule to show cause why a verdict should not be entered for the plaintiff, or judgment arrested, or judgment entered for the plaintiff, non obstante veredicto, or the judge's order for pleading payment into court be set aside, or a replender awarded. Stat. 3 & 4 W. 4, c. 42, s. 21, enacts: "That it shall be lawful for the defendant in all personal actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation or debauching of the plaintiff's daughter or servant,) by leave of any of the said superior courts where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading as the *said judges, or such eight or more of them as aforesaid, shall, by any rules or orders by [*925 them to be from time to time made, order and direct."(a) The exception applies to an action for assault and battery on the plaintiff's son as well as on himself. This is the direct meaning of the words: no distinction has ever been drawn between the one case and the other; nor is there reason for it.

Lord DENMAN, C. J. There is no doubt in this case. The opinion of the jury on the trial is evident: but it is contended that this court ought to interpose because an assault and battery on the plaintiff's son is within the exception in the statute. But I think that, most clearly, "assault and battery is there spoken of with reference to the persons of the plaintiff and his wife, and that battery of the son or servant is not included. And this is shown, I think, by the latter words of the exception.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred. Rule refused.

Judgment being entered up, the plaintiff brought error in the Exchequer Chamber, assigning as special grounds that the plea was insufficient in law, and that "judgment ought to have been given for the said plaintiff, notwithstanding the said plea, issue and verdict." Joinder in error. The writ of error was now argued.(b)

**Newton*, in person. There is no precedent for paying money into court in such a case as this. The action is strictly "for assault [*926

(a) See R. HE. 4 W. 4, *General Rules and Regulations*, 17, 18, 5 B. & Ad. vi. Also, R. Trin. 1 Vict. 8 A. & E. 278.

(b) Before Tindal, C. J., Maule and Creswell, Ja., Parke, Alderson, Rolfe, and Platt, Ba.

and battery," and therefore within the exception. [TINDAL, C. J. It is not for assault and battery on the plaintiff himself. "Debauching of the plaintiff's daughter or servant," is expressly mentioned in the exception; does not that show (according to the rule *expressio unius, &c.*) that other cases of injury to members of the plaintiff's family are not to be excepted?] An action on the case would lie for debauching the daughter or servant, without alleging an assault. [MAULE, J. The son himself might bring an action of assault and battery; and there money could not be paid in: but the father's action stands on a different ground.] An action of trespass lies specifically for debauching a daughter, without allegation of a per quod, where the house has been broken open: judgment of BULLER, J., in *Bennett v. Alcott*, 2 T. R. 166.(a) [TINDAL, C. J. The wrong to the daughter would be laid as an aggravation. The plaintiff might recover for the rest of the injury without proving this. ALDERSON, B. The cause of action is the breaking of the house. It might be laid in such a declaration that the defendant in entering the house used abusive language to the plaintiff; but you could not say that the action was for slander.] If a son is assaulted, it is a substantive cause of action for the father. [ALDERSON, B. Not without something more. TINDAL, C. J. Beating a visitor or a lodger would be an aggravation.] The case cited shows that an action lies at the suit of a father for an assault upon his son or daughter, irrespectively of loss of service. *927] [PARKE, B. If his house were broken into, he would recover larger damages on account of the accompanying circumstances, of which this might be one. But in an action for the assault merely, however atrocious it might be, he could recover nothing unless loss of service were shown.] In *Ditcham v. Bond*, 2 M. & S. 436, it was held that a count for beating plaintiff's servant, per quod servitium amisit, might be joined with counts in trespass; but, if the right to recover on such a count depends on the per quod, it seems to be a count in case, and ill joined with others in trespass. [TINDAL, C. J. It appears to us, from the words of this clause, that the "actions for assault and battery" must be for assault on the plaintiff himself. If the framers of the act had meant to include under those general words an assault on the plaintiff's son, would they afterwards have specified "debauching of the plaintiff's daughter or servant?"] The words "debauching," &c., refer to actions on the case for wrongs of that kind. [ALDERSON, B. The "personal actions" spoken of must, from the nature of the provision, be actions for injury to the plaintiff himself; and then the cases excepted must be from among such actions. MAULE, J. In a case like this, the object of the statute is consulted by leaving the party directly injured to bring his own action, in which, by the excepting clause, money cannot be paid into court. TINDAL, C. J. We all think the point quite clear.]

Greaves, contra, was not heard.

Per Curiam.

Judgment affirmed.

(a) See *Russell v. Corne*, 2 Ld. Ray. 1031, there cited.

*HOLLOWAY v. TURNER and ROPE. Feb. 8. [*928

In trespass for taking plaintiff's goods in execution under a warrant of attorney and judgment which were afterwards set aside as illegal, the plaintiff cannot claim as part of the damage his costs incurred in vacating the warrant of attorney and judgment.

TRESPASS. The declaration stated that defendants, under pretence and colour of a certain supposed judgment of her majesty's Court of Queen's Bench, founded on a certain supposed warrant of attorney, with force and arms, &c., broke and entered divers rooms of plaintiff, being in, &c., and made a noise, &c., and with force, &c., under pretence and colour of the said supposed judgment, seized and took divers goods and chattels of plaintiff, to wit, &c., there found, &c., and carried away and converted the same; and other wrongs, &c.; by means of which premises plaintiff and his family were disturbed, &c., and the rooms became and were untenable, &c., and plaintiff was injured in his good name, &c., and was forced "to incur, pay and become liable for divers large costs, charges, expenses and sums of money," amounting, &c., "in and about endeavouring to prevent the said sale, and in setting aside the said judgment." Plea, Not guilty. Issue thereon.

On the trial, before WILLIAMS, J., at the sittings in Middlesex after Hilary term, 1844, it appeared that the goods were taken in execution under a judgment entered up on a warrant of attorney given by the now plaintiff to the now defendant Rope; and that, after levy, the warrant of attorney and all subsequent proceedings were set aside by a judge on summons, because the execution of the warrant of attorney had not been attested, according to stat. 1 & 2 Vict. c. 110, s. 9, by an attorney expressly named on the part of Holloway. *The plaintiff had a verdict for 116*l.*, including 26*l.* for costs of setting the warrant of attorney aside; but leave [*929 was given to reduce the verdict by that amount if the court should think the costs not recoverable in the present action. In Easter term, 1844, *Jervis* obtained a rule nisi for reducing the verdict, or for a new trial.

Lush now showed cause. [Lord DENMAN, C. J. Can you make the payment of these costs part of the consequences of the trespass?] The execution could not be got rid of without setting aside the warrant of attorney. In *Sandback v. Thomas*, 1 Stark. N. P. C. 306, Lord ELLENBOROUGH said: "If, by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses." Here the incurring of costs by the plaintiff was a damage necessarily consequent upon the act of the defendant.

Jervis, contra. The plaintiff might perhaps have recovered these costs in another form of action, or by application to the judge at chambers: the question is, not if there be any mode of recovering them, but how they can be a damage resulting from this trespass. *Sandback v. Thomas*, was an action on the case for maliciously holding to bail, in consequence of which

plaintiff was put to expense. But this is an action of trespass for a personal injury; and the plaintiff can recover only for what is part of that injury.

Lord DENMAN, C. J. I think there is no doubt here. The case cited *930] does not apply. The plaintiff might have recovered these costs in a proper form of proceeding, but he cannot sue the defendants for a trespass per quod he was put to expense in removing the cause of the trespass.

PATTESON and COLERIDGE, Js., concurred.(a)

Rule absolute.

(a) Wightman, J., was absent.

COBB v. BECKE and Another. Feb. 12.(b)

A., being defendant in an action brought by B., paid the debt and costs to his own country attorney for transmission to B. The attorney sent a check, exceeding the amount, to his own town agent, directing him to pay the debt and costs out of it. The agent acknowledged the receipt by letter to the country attorney, and therein promised to apply the money as directed: but he retained it in reduction of a debt due to him from the attorney.

Held, that there was no sufficient privity to support an action for money had and received by A. against the agent.

ASSUMPSIT for money had and received. Plea, Non assumpsit.

On the trial, before Lord DENMAN, C. J., at the London sittings after Hilary term, 1844, it appeared that one Cutbush had brought an action against the plaintiff Cobb, in which Dally, of Maidstone, was Cobb's attorney. The defendants were the London agents of Dally. The proceedings in the action were, eventually, stayed on payment of debt and costs, amounting to 17*l.* 18*s.* 4*d.* The money was paid by Cobb to Dally for the purpose of complying with these terms; and Dally thereupon transmitted to the defendants his own check for 20*l.*, with directions to pay the amount of the debt and costs to Cutbush's attorney. The defendants wrote the following letters to Dally.

"Feb. 24, 1843.

"Cobb ats. Cutbush.

"Dear Sir,—We have received the 20*l.*, which shall be applied as you direct. We have applied to plaintiff's *931] agents to tax the costs, and think the proper construction of the order is, that the 17*l.* 18*s.* 4*d.* is to be included with the other amount. Yours truly,

"BECKE & FLOWER."

"Cobb ats. Cutbush.

"March 4, 1843.

"Dear Sir,—We have applied to plaintiff's agents, inquiring when they intend to tax the costs; but they say the delay is their own: we expect, however, notice daily. We did not think that the 17*l.* 18*s.* was to be paid

(b) Reported by E. Smirke, Esq.

down; but as plaintiff's agents are aware that defendant considers it is, they will, of course, insist upon the payment. We are, &c.

"BECKE & FLOWER."

The defendants, however, instead of paying over the money, retained it in satisfaction of a balance due from Dally to them, on a general account of agency business. The following correspondence then took place between the defendants and the attorneys of Cutbush, who afterwards became the attorneys of the plaintiff in this cause.

"*Cutbush v. Cobb.*"

"June 8, 1843.

"Dear Sirs,—Mr. Dally advises us the defendant has remitted to you, on the plaintiff's account, the sum of 20*l.*: please send us a check in the course of the morning. We are, &c.

"FYSON & CURLING.

"Messrs. Becke & Flower."

*"June 10, 1843.

"Dear Sirs,—Mr. Dally is incorrect in stating that we received [932 on plaintiff's account, 20*l.*: we received that sum on his own account; and he instructed us to pay your clients a certain sum out of it: but, inasmuch as he has given us notice of applying to the Court of Bankruptcy to relieve himself of our demand, (upwards of some hundreds,) we do not (as you may well suppose) feel inclined to increase our debt. We think it hard upon defendant, who, very probably, has paid Mr. Dally the amount claimed; but it would be still harder upon us, who are such great sufferers, to lose this sum. We are, &c.

"BECKE & FLOWER.

"Messrs. Fyson & Curling."

"June 12, 1843.

"Dear Sirs,—We have received your letter, in which you state that the remittance of 20*l.* we requested you to pay us was made on Mr. Dally's account, and not on account of the plaintiff: but we have in our possession your letter to Mr. Dally, in which you say, '*Cobb a/s. Cutbush.* We have received the 20*l.*, which shall be applied as you direct.' We must refer you to his letter of instructions, and beg you will send us a check without further delay. Yours truly,

"FYSON & CURLING.

"Messrs. Becke & Flower."

The jury found that the defendants knew that the money remitted to them was the plaintiff's. A verdict was taken for the plaintiff, subject to a motion to enter a nonsuit. In the following term,

Jervis obtained a rule nisi accordingly, referring to *Williams v. Everett*, 14 East. 582. In this vacation, (a) [933

(a) February 5th, 1845. Before Lord Denman, C. J., Patteson and Coleridge, J. *Wightman, J.*, was sitting at Nisi Prius.

Martin and *Butt* showed cause. The relation between the attorney and town agent is peculiar, and gives the agent a delegated authority, which creates a privity, for some purposes, between him and the client, just as much as if the client had remitted the money directly to the agent. A similar objection was made in *Moody v. Spencer*, 2 Dowl. & R. 6, and overruled. *Lilly v. Hays*, 5 A. & E. 548, is also an authority on this point. There the defendant was held liable to pay the plaintiff moneys remitted to him for that purpose; and the ground of liability was, that the defendant knew of the intended application of the moneys, and promised to pay accordingly. *Sadler v. Evans*, 4 Burr. 1984, shows only that the title to property cannot be tried by an action of indebitatus assumpsit against a mere collector of the adverse claimant. The cases go to the extent of this proposition,—that, where A. sends money to his friend B. to pay C., and B. promises A. to pay it to C., there B. is liable directly to C. [PATTESON, J. That is going very far. Your doctrine would almost go to the extent of making a banker liable for his customer's debt, whenever the customer makes a remittance to the banker to pay it.]

Keating, contra. The money remitted to the defendant was not the plaintiff's. It was a check for *a different and larger sum, out of *934] which the defendants were to pay the same amount that the plaintiff had paid to Dally. If Dally had sued the defendants, they could not have set up the title of the plaintiff. There is so little privity between the agent and the country attorney's client, that payment of debt and costs by a defendant to the agent of the plaintiff's attorney is not payment to the plaintiff; *Yates v. Freckleton*, 2 Doug. 623; *Scrace v. Whittington*, 2 B. & C. 11. The fact that the defendants knew the money to belong to the plaintiff is immaterial. In *Heath v. Chilton*, 12 M. & W. 632, the defendant was held not liable to an action by three executors for money which he knew to belong to the executors generally, but which he had received under the authority of two of them only. The general rule is, that no one can call an agent to account but his own principal; a rule established by many cases, and illustrated by *Stephens v. Badcock*, 3 B. & Ad. 354; (a) *Edden v. Read*, 3 Camp. 339; *Howell v. Batt*, 5 B. & Ad. 504; *Sims v. Brittain*, 4 B. & Ad. 375. Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the court.

The facts of this case appear to be as follows. The present plaintiff Cobb being defendant in an action at the suit of one Cutbush, and a Mr. Dally of Rochester being Cobb's attorney, and the present defendants being Dally's agents in London, an order was made *for staying proceedings on payment of debt and costs. Cobb paid money to Dally for this purpose; upon which Dally sent to the defendants his own check for 20*l.*, being somewhat more than the debt and costs, (which turned out to be 17*l.* 18*s.* 4*d.*.) directing them to pay the debt and costs. They acknowledged the receipt to Dally by letter, and said that the money should be

(a) See *Bamford v. Shuttleworth*, 11 A. & E. 926; *Wakefield v. Newbon*, ante, 276.

applied accordingly. Afterwards they retained it in satisfaction of a balance of general account due to them from Dally. Cobb brought this action for money had and received : and on the trial the jury found that the defendants knew the money remitted to them to be Cobb's. The question is, whether there is sufficient privity between Cobb and the defendants to sustain this action.

The general rule undoubtedly is, that there is no privity between the agent in town and the client in the country : the former cannot maintain an action against the latter for his fees, nor the latter against the former for his negligence. Something, therefore, is necessary, beyond the mere relation of the parties to each other, as above stated, to make the agent in town liable to the client. If Cobb had transmitted the money direct to the defendants, or if he had desired Dally to transmit it to them specifically, and they had received it as from Cobb and not as from Dally, doubtless they would have become Cobb's agents, and accountable to him for the appropriation of it. But, upon the evidence, it appears that Cobb paid the money to Dally for the purpose of paying the debt and costs, but without any specific directions through what channel it was to be remitted. The money appears to have been mixed with Dally's general funds; and he sent to the defendants his own *check. He was at liberty to have sent the money through his bankers, or direct to Cutbush's attorney, or [*936 through any channel which he chose to select: and, unless the person through whom he sent, be he who he would, became, by the employment of Dally, the agent of Cobb, it seems difficult to contend that the defendants became so.

The case of *Lilly v. Hays*, 5 A. & E. 548, as well as those of *Williams v. Everett*, 14 East. 582; *Baron v. Husband*, 4 B. & Ad. 611, and *Howell v. Batt*, 5 B. & Ad. 504, turned entirely on the question, whether the defendant had entered into any binding engagement to hold to the use of the plaintiff money which had been transmitted to him, by a third person, for the plaintiff, and are not applicable to the present case, in which there has been no direct engagement entered into by the defendants at all.

The case of *Moody v. Spencer*, 2 D. & R. 6, differs from the present in this, that there the defendant, the town agent, had received money in the course of the suit, from the opposite party for the client. It could not be said that the town agent received it to the use of the attorney in the country; and, as it was not received on his (the agent's) own account, it must be treated as received to the use of the client.

It is not pretended that an agent can delegate his authority, or that he can, by employing a third person to do the whole or any part of the business intrusted to him, make that third person an agent of his principal. But it is argued, for the plaintiff, that Dally was merely the hand employed to forward the plaintiff's money to *the defendants, to be by them [*937 applied in payment of the debt and costs. If the facts warranted such a conclusion, doubtless this action might be maintained. But as the

facts show that the plaintiff employed Dally, and that Dally, and not the plaintiff, employed the defendants, we are of opinion that no privity is established between the plaintiff and defendants, and that the rule for a nonsuit must be made absolute.

Rule absolute.

THOMAS HART, administrator of ANN HART, deceased, v. WILLIAM STEPHENS. *March 1.*

A feme sole, payee of a promissory note payable with interest, married, and her husband survived her. *Held*, in an action on the note by her administrator,

1. That the note did not become the property of the husband, but passed to her administrator, though the husband had received the interest during her life; for that he did not thereby reduce the chose in action into possession.
2. That the payment of such interest, in the wife's life, to the husband, within six years before action brought, must be considered as made to him in the character of agent to the wife, and was an answer to a plea of the Statute of Limitations.
3. That, under stat. 6 & 7 Vict. c. 85, s. 1, the husband was a competent witness in such action to prove the payment of interest.

ASSUMPSIT on a promissory note of defendant, made 16th February, 1812, in the lifetime of the intestate, promising to pay to her, by her then name of Anne Stephens, 200*l.* with interest; averment that defendant promised intestate to pay her the note on request.

Pleas. 1. That defendant did not make the note. *Issue thereon.*
2. That the cause of action did not accrue within six years. *Replication*, that it did accrue, &c. *Issue thereon.*

On the trial, before LORD DENMAN, C. J., at the London sittings after Michaelmas term, 1843, the plaintiff proved that the note was made by defendant in February, 1842, and delivered to the intestate, who was then *938] a feme sole, and who afterwards married William Hart. In support of the replication to the second plea, the plaintiff called William Hart, the husband, to prove that he had received interest on the note from the defendant before the death of the wife and within six years. The evidence was objected to, but the lord chief justice suggested that it should be received, which was done; and he then directed a verdict for the plaintiff on the first issue, and for the defendant on the second, giving the plaintiff leave to move for a verdict on the second issue alone.

In Hilary term, 1844, *Godson* obtained a rule nisi accordingly. In this vacation, (a)

Jervis showed cause. First, supposing the husband to be a competent witness, his evidence did not support the plaintiff's case. His receipt of the interest reduced the note into possession: the defendant's liability was therefore to the husband, not to the wife. No promise to the wife can be inferred from payment of interest under such circumstances. Money of the wife would vest in the husband on the marriage: but it will be argued that

(a) February 2d, 1845. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, J.

a chose in action. In *M. Neilage v. Holloway*, 1 B. & Ald. 218, (a) it was held that a husband might sue alone on a bill of exchange made payable to the wife, *dum sola*, though she had not endorsed it. [WIGHTMAN, J. The husband there adopted the bill by bringing the action.] The court appear to rest their judgment principally upon the general doctrine that a negotiable instrument passes to the husband as a chattel. [PATTESON, J. It was not decided that the wife could not *have joined.] She could not, if the absolute property passed to the husband. [WIGHTMAN, J. If she had survived her husband, could his representatives have sued?] That follows from the decision. In *Connor v. Martin*, (b) it was laid down that, when a promissory note had been given to a woman before her marriage, upon her marriage "by act of law it became the sole right and property of her husband." But here it is sufficient for the defendant's case that the note should have been reduced into the husband's possession, as it was by his taking the interest. His receipt would be on his own account, not in the character of agent to his wife. It is like a payment of part of the principal to him. [COLERIDGE, J. Suppose the note had been settled to the separate use of the wife.] In that case a jury would probably have found that the husband received the interest as agent to the trustees. But, the legal right to the note remaining in the wife till the marriage, she could not invest the husband with the character of agent. Secondly, the husband was not a competent witness. Stat. 6 & 7 Vict. c. 85, s. 1, will be relied upon. But there the first proviso excepts from the operation of the act "any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part." Here the husband is entitled to the proceeds of the action: the wife can have no debts; her debts become the debts of the husband. [PATTESON, J. The creditors of the wife, *dum sola*, would have their remedy against her separate estate. Suppose the husband had taken out administration, could he have been sued in his own name for her debts contracted *dum sola*? If the creditor sued *the present plaintiff for such debts, would it not be a *devastavit* to pay the money recovered on this note to the husband?] The contrary might be contended. [WIGHTMAN, J. Could not the wife have been sued for such debts if she had survived her husband?] It is not clear that she could. [COLERIDGE, J. In *Wentworth's Office of Executors*, 369, 14th ed., it is laid down that the husband is not, after the wife's death, liable to her debts contracted before marriage.] The authorities are not quite consistent. [WIGHTMAN, J. *Gaters v. Madeley*, 6 M. & W. 423, seems to be against you. Lord DENMAN, C. J. *Richards v. Richards*, 2 B. & Ad. 447, there relied upon by the court, puts a promissory note on the footing of an ordinary chose in action.]

Godson and Pashley, *contra*. First, in Co. Lit. 351 b, it is said that "marriage is an absolute gift of all chattels personals in possession in her

(a) See *Mason v. Morgan*, 2 A. & E. 30.

(b) Cited in *Rawlinson v. Stone*, 3 Wils. 5.

own right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them." A wife is allowed to join in an action on a promissory note made to her during coverture; *Philliskirk v. Pluckwell*, 2 M. & S. 393. So, in Co. Lit. 120 a, to show that a right of presentation to a church which has become void is not a mere chose in action, it is said that, "if a feme covert be seised of an advowson, and the church becometh void, and the wife dieth, the husband shall present to the advowson; but otherwise it is of a bond made to the wife; because that is *merely in action;" which is cited in 1 Rol. *941] *Abr.* 345, *Baron & Feme* (H), pl. 6, 7. The questions suggested from the bench, as to the husband's liability after the wife's death, must be answered against the defendant. In *Mitchinson v. Hewson*, 7 T. R. 348, (a) it was decided that the husband cannot be sued alone for a debt of the wife contracted dum sola. And in *Heard v. Stamford*, 3 P. W. 409, (cited in 2 Kent's Comm. 145, to that effect,) it was decided that the husband, after the wife's death, is not liable at all for her debts contracted dum sola. The decision in *McNeilage v. Holloway*, 1 B. & Ald. 218, is not in the defendant's favour. There the husband sued on the note, which was an act of reducing into possession. The dicta in that case which are unfavourable to the plaintiff here have been impugned in *Gaters v. Madeley*, 6 M. & W. 423, 427, which case has been recognised by the Court of Exchequer Chamber in *Sherrington v. Yates*, 12 M. & W. 855, 865. The authorities collected in note (a) to *Forth v. Stanton*, 1 Wms. Saund. 210 a, (6th ed.,) are decisive on this part of the case. The extent of the wife's interest in personal chattels, where she survives her husband, and the nature of a reduction into possession, were much discussed in *Purdew v. Jackson*, 1 Russ. 1. [PATTESON, J. Mr. Jervis insists that here the note was reduced into possession by the husband.] *Howman v. Corie*, 2 Vern. 190, (b) shows that the receipt of the interest has not that effect. [WIGHTMAN, J. How *942] would it be if the husband had received part of the principal?] *That would not have reduced the note into his possession; *Nash v. Nash*, 2 Madd. 133, 1 Williams on Executors, 683, (3d ed.) [COLERIDGE, J. Can the husband reduce into possession by suing alone?] He may sue alone or jointly, at his election; *Hilliard v. Hambridge*, Aleyn, 36. In *Wills v. Nurse*, 1 A. & E. 65, 74, TINDAL, C. J., pointed out that the wife might join in an action upon a contract made with her and her husband in consideration of forbearance to enforce a right of the wife. [COLERIDGE, J. Suppose the note were payable at a time before which the husband died: could he not reduce into possession at all?] He could not. The note is no more vested in the husband by his receipt of interest here than the wife's freehold would be by his receipt of rent. Next, the husband was a competent witness before stat. 6 & 7 Vict. c. 85. The onus of proving his

(a) See Byles on Bills, 47. (4th ed.)

(b) See note (1), 3d ed.

incompetency lies upon those disputing the competency; and, since nothing appears here as to the amount of the wife's assets or debts, there was a mere possibility of interest in the husband, which is not enough to disqualify him; *Rex v. Kirdford*, 2 East, 559; *Rex v. Bray*, Ca. K. B. Temp. Hardwicke, 358, commented upon in *Bent v. Baker*, 3 T. R. 27. *Thomas v. Bird*, 9 M. & W. 68, is a very strong authority to the same effect. Further, stat. 6 & 7 Vict. c. 85, will be construed liberally, as stat. 3 & 4 W. 4, c. 42, s. 26, has been; *Hoyle v. Coupe*, 9 M. & W. 450. The husband's right to call on the administrator would not, at any rate, be a legal one; and it may be questioned whether "any other than a legal right is within the proviso. How can the suit be for his "immediate" behalf, when he would be able to obtain nothing till the assets were marshalled, and the debts and expenses ascertained? *Cur. adv. vult.* [*943]

PATTESON, J., now delivered the judgment of the court.

This was an action on a promissory note, by the administrator of his mother, to whom it had been given before marriage. The only witness called was her husband, who proved repeated payments of interest to himself in his wife's lifetime. He was objected to as interested; and it was argued, on the judgment of the court in *McNeilage v. Holloway*, 1 B. & Ald. 218, that he himself had become the owner (or rather the holder) of the note, having reduced it into possession by the receipt of interest.

For this latter proposition we think there is no foundation. The decision in *McNeilage v. Holloway*, is wholly inapplicable here. The observations of Lord ELLENBOROUGH, in giving judgment, are undoubtedly too strong, and have been corrected and modified by this court in *Richards v. Richards*, 2 B. & Ad. 447, and by the Court of Exchequer in *Gaters v. Madeley*, 6 M. & W. 423. But, even if they were in strict accordance with the law, they would not avail the defendant in this case; for they suppose a reduction into possession by the husband during his wife's life, of which his merely receiving interest in the way stated is not even any evidence.

We have no doubt that the husband was a competent *witness under the late act, notwithstanding his possible benefit from his wife's estate. [*944]

It was further argued that, if he was competent, his evidence did not avail for the purpose for which it was given, the taking the note out of the Statute of Limitations. But it was clear that it did. If he received the interest, not in his own right but as agent for his wife, which he clearly did, then the interest of course was paid to her. Rule absolute. (a)

(a) In a case in the Supreme Court of New York, *Woods v. Williams*, 9 Johnson, 123, the administrator of a feme covert sued for a debt due to the intestate: the husband, having released all his right "to any sum or sums of money which might be recovered in the said cause," was admitted as a witness for the plaintiff. It was objected, on motion for a new trial, that his interest was merely future and contingent, and incapable of being released; but the court (May, 1812) held that the interest was a present right, to take effect in future, and therefore might be presently released; referring to Co. Lit. 265 a.

PHILLIPS v. SHERVILL.

It is no objection to a distress for rent, that the tenant, after it became due, petitioned the Insolvent Debtors' Court, under stat. 1 & 2 Vict. c. 110, inserted the rent in his schedule as a debt, was opposed in respect of it by the landlord, and obtained his discharge.

CASE for an excessive distress. The first count charged the defendant with distraining for 11*l.* rent, when only 1*l.* was due. The second count was on the statute of Marlbridge, 52 H. 3, c. 4, for a like cause of action. There was a third count, not material here. Plea: Not guilty, by statute. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the sittings in Middlesex after Michaelmas term, 1843, the material facts appeared to be as follows. Half a year's rent, amounting to 10*l.*, was due from plaintiff to defendant *at Lady Day, 1843. After that day the plaintiff was arrested by *945] another creditor, and imprisoned; and, on May 8th, 1843, he petitioned the Insolvent Debtors' Court, under stat. 1 & 2 Vict. c. 110, s. 35. The vesting order was dated May 9th. In his schedule, dated May 10th, plaintiff inserted defendant as a creditor for 10*l.*, the rent last mentioned. The defendant appeared in the Insolvent Debtors' court as such creditor, and opposed the discharge; but it was granted, June 17th, 1843. On the 19th of August, plaintiff having ever since Lady Day kept possession of the premises for which the rent was claimed, defendant put in a distress for the 10*l.* formerly due, and an arrear of 1*l.* which had accrued since, and seized the goods mentioned in the declaration, which were the plaintiff's property, bought since his discharge. The plaintiff contended on the trial that, after discharge in the Insolvent Debtors' Court, the remedy by distress for the rent previously due was barred; the defendant, that it still subsisted. The lord chief justice reserved the point: and the plaintiff had a verdict for 13*l.* 14*s.* on the first and second counts. On the third the verdict was for the defendant. *Platt*, in Hilary term, 1844, moved, according to the leave reserved at the trial, for a rule to show cause why a verdict for the defendant should not be entered on the first two counts. He cited *Briggs v. Sowry*, 8 M. & W. 729, and stat. 1 & 2 Vict. c. 110, s. 58. *PATTESON, J.*, mentioned *Newton v. Scott*, 9 M. & W. 434.(a) A rule nisi was granted. In Michaelmas term, 1844,(b)

*946] **Chilton and Hugh Hill* showed cause. In *Briggs v. Sowry*, the only point on which that case can apply here arose upon a claim for rent due after bankruptcy. In *Newton v. Scott*, the rent was due before bankruptcy, but the goods taken were those not of the bankrupt tenant but of another person; the right which the landlord had to distrain such goods on the premises was a collateral remedy, not extinguished by the bankruptcy of the tenant himself. Stat. 1 & 2 Vict. c. 110, s. 58, relied upon by the

(a) Affirmed on error, in Exchequer Chamber, *Newton v. Scott*, 10 M. & W. 471.

(b) November 11th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, J.

defendant, enacts, "That no distress or distresses for rent made and levied after the arrest or other commencement of the imprisonment of any person whose estate shall, by any such order as aforesaid, have been vested in the provisional assignee, upon the goods or effects of any such person shall be available for more than one year's rent accrued prior to the making of such order, but that the landlord or party to whom the rent shall be due shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by this act." The privilege there recognised is against the policy of the act, and extends only to distresses made before the discharge. From that time forward the act protects both the person and goods of the debtor from any process as to debts included in the schedule. If the landlord then has not been vigilant enough to distrain, he is no longer aided by sect. 58 against the operation of the vesting order: but, as to any subsequent rent, he is exempted from loss by sect. 50, which enables him to put an end to the lease if the assignees will not take it.

*Reference may be made on the other side to sect. 90, which enacts that no person discharged under the act shall afterwards be [947 imprisoned by reason of the judgment entered up under s. 87, "or for or by reason of any debt or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same; and to sect. 91, which enacts that, "after any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid, no writ of fieri facias or elegit shall issue on any judgment obtained against such prisoner, for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof except upon the judgment entered up against such prisoner according to this act; and that if any suit or action shall be brought or any scire facias be issued against any such person, his heirs, executors, or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognisance acknowledged by such person for the same, except as aforesaid, it shall be lawful" to plead the discharge. And it may be contended that these clauses give the limit of the insolvent's exemption after discharge, and that the remedy against him by distress, not being expressly barred, still subsists. On the same principle of construction it was once suggested that, after certificate, a bankrupt's person only, and not his property, was relieved from process of execution for prior debts, under stat. 6 G. 4, c. 16, ss. 121, 126: but this court held *otherwise; *Davis v. Shapley*, 1 B. & Ad. 54. Under the present act, [948 the discharge would be complete without sects. 90, 91: those clauses only point out modes of relief. Nor is it clear that sect. 91 does not include proceeding by distress, which is in the nature of process in a suit.

But, further, by sect. 87, when a prisoner obtains his discharge under the

statute, a judgment is entered up against him for the amount of the debts stated in this schedule; and a party cannot distrain after having taken a security of a higher degree. Thus it is laid down in Bull. N. P. 182, that, "if a landlord accept a bond for the rent, this does not extinguish it, for the rent is higher, and the accepting of a security of an equal degree is no extinguishment of the debt. But a judgment obtained upon a bond is an extinguishment of it:" for which *Higgins's Case*, 6 Rep. 44 b, is cited. There, to an action of debt on bond, the defendant pleaded a judgment recovered for the debt aforesaid: on demurrer, the plaintiffs argued "that if a man recovers debt on a bond, or rent on a lease for years, it is at the plaintiff's election to sue execution on that judgment, or to have a new action:" but the Court of Common Pleas held otherwise, saying that, after judgment on a bond, "by judicial proceeding, and act in law, the debt due by the bond is transformed and metamorphosed into a matter of record; and judgment in a court of record is of a higher nature than a statute staple, statute merchant, or any recognisance acknowledged by assent of the parties, without judicial proceeding." In Com. Dig. *Action* (K 3,) it is laid down that "In personal actions, a recovery upon *demurrer, confession, or verdict, &c., is a bar to every other personal action for ever; for no one personal action is of higher nature than another; and therefore, the party has no remedy but by error, or attain." "So, though the action be of another nature: as a recovery in debt is a bar in assumpsit upon the same contract, *et e contra*." A demand for rent ranks with a debt by specialty, according to *Davis v. Gyde*, 2 A. & E. 623, 626, and *Gage v. Acton*, 1 Salk. 325, there cited, and will therefore be extinguished in the same manner. [COLERIDGE, J. Had the judgment been actually entered up in the present case?] The warrant of attorney to enter up judgment must be executed in every case before the prisoner can be discharged: the entry of judgment follows as of course; the court will presume all things *ritè acta*. [WIGHTMAN, J. The judgment is to operate on after acquired property.] The goods in question were so.

Platt, Pashley and Pearson, *contra*. Cases in which bankruptcy or insolvency has been held to bar process on contract have no application here. *Davis v. Shapley*, 1 B. & Ad. 54, is such a case. There it was decided that a personal remedy, process in an action for goods sold, was barred by certificate in bankruptcy. But rent issues from the premises themselves; they are bound for the payment; and therefore the goods of a third person, found there, are liable, though the remedy against the tenant on his personal contract be gone. The judgments of the Court of Exchequer in *Briggs v. Sowry*, 8 M. & W. 729, and *Newton v. Scott*, *950] 9 M. & W. 434, (a) put the point out of doubt. The question in the latter case was considered to be, "whether the certificate obtained by a bankrupt tenant amounts to a release of the rent;" and the court held that it did not. The plaintiff here must contend that the rent was released by

(a) Affirmed on error, in Exchequer Chamber, *Newton v. Scott*, 10 M. & W. 471.

ne insolvent's discharge under stat. 1 & 2 Vict. c. 110. In *Stevenson v. Wood*, 5 Esp. N. P. C. 200, where a landlord had received money for rent due after an act of bankruptcy, and the assignees sought to recover it back, Lord ELLENBOROUGH said: "The landlord has by law a right of distress; he has a legal lien on the bankrupt's goods, unconnected with bankruptcy; if he thinks fit to waive that right, and accept of the rent from the assignees, who may be benefited by having the goods, without being sold under the distress, the landlord should not be placed in a worse situation than if he had made an actual distress; it would be a fraud on his legal rights to hold otherwise:" and the defendant had a verdict. That decision was adopted by the Court of Common Pleas in *Mavor v. Croome*, 1 Bing. 261. The grounds of judgment in these cases avail equally here. The object of the Insolvent Debtors' Acts is to relieve the debtor, personally; therefore, by stat. 1 & 2 Vict. c. 110, ss. 90, 91, after a discharge under that act, his person is delivered from arrest and his goods from process in any action against him for the causes there mentioned: but, although particular modes of proceeding against his goods or person are specified by "these clauses, it is not said, or intended, that, in case of rent remaining due, the collateral remedy by distress of goods found [*951 upon his premises shall cease: and sect. 58, in restraining, expressly recognises it. Under stat. 7 G. 4, c. 57, it was held that, in an action of assumpsit, a discharge by virtue of the statute must be pleaded, and could not be shown under the general issue; *Bircham v. Creighton*, 10 Bing. 11; and the reason given applies here; "that the discharge is a statutory answer to the plaintiff's demand, and does not go to the destruction of the debt." [WIGHTMAN, J. The rent here was inserted in the schedule. What effect do you give to the judgment under sect. 87?] A new right is given by that clause, on a certain contingency; but the remedy is personal; it does not interfere with the collateral recourse to the premises. In replevin, it would be no answer to an avowry for rent in arrear, that the distrainor had recovered judgment in an action for use and occupation. The landlord's right is like a right of lien, which, while unsatisfied, is not destroyed by any thing short of taking possession and then waiving it, as in *Jacobs v. Latour*, 5 Bing. 130. The authorities cited on the second point fail to show that the remedy of a landlord by distress upon the premises for rent is merged in a judgment between the provisional assignee and the tenant. *Davis v. Gyde*, 2 A. & E. 623, so far as it applies, is in the defendant's favour; so also is 1 Roll. Abr. 605, *Delt (Extinguishment)* A. pl. 2, there cited.

Cur. adv. vult.

*Lord DENMAN, C. J., in this vacation, (February 12th,) delivered the judgment of the court. [*952

The question in this case was whether the landlord could, after the discharge of the tenant under the Insolvent Debtors' Act, distrain for rent due before the discharge, and mentioned in the schedule.

It was said, upon the argument, that, as the person of the tenant was

protected after his discharge against all proceedings in respect of debts mentioned in the schedule, and as his future effects were protected from process of execution except upon the judgment confessed to the provisional assignee, the remedy by distress was gone also; and that, by the operation of the Insolvent Debtors' Act, the debt was, for all purposes of remedy except under that act, virtually extinguished. This may be so as far as regards the remedy by action, but not as regards the remedy by distress. The rent itself was not extinguished; and the remedy by distress is wholly collateral to the remedy by action. It was decided in the cases of *Briggs v. Sowry*, 8 M. & W. 729, and *Newton v. Scott*, 9 M. & W. 434,(a) that the discharge of the person of the tenant under the bankrupt acts does not take away the right of distress; and upon that part of the case there is a perfect analogy between a discharge under the bankrupt acts and a discharge under the insolvent acts.

But it was contended that the judgment confessed by the insolvent debtor to the provisional assignee, under the eighty-seventh section of the Insolvent Act, was a security of so high a nature that there was no other remedy for any claim or demand included in it, except *by putting that judgment in force by execution upon it. That judgment, however, is neither confessed to the landlord, nor is it co-extensive in effect with the remedy by distress. The judgment could only operate upon the future goods of the debtor: but, under a distress, the goods of any person could be taken, if upon the demised premises. The judgment confessed to the provisional assignee may have the effect of an additional and collateral security, but neither merges nor extinguishes the peculiar remedy by distress, which is incidental to rent service and is quite independent of other remedies, and which remains notwithstanding the discharge of the tenant under the insolvent acts, except so far as these acts have expressly restrained it.

The verdict, therefore, in this case, will be entered for the defendant pursuant to the leave reserved. Rule absolute.

(a) Affirmed on error, in Exchequer Chamber, 10 M. & W. 471.

DOE on the demise of MUSTON v. HARRIET GLADWIN. March 1.

Lessee of buildings covenanted in the lease to "insure and continue insured" such buildings in the joint names of himself and the lessor, his executors, &c., or assigns; and there was a proviso for re-entry on breach of the covenant. The lessee insured in his own name singly, but showed the policy to the lessor, who approved of it, and accepted rent during the next three years ending at Christmas, 1842. The premiums of insurance were duly paid up to that time, the premium at Christmas, 1842, covering the year 1843, and the policy continuing unaltered. In January, 1843, the lessor assigned; and the assignee, in the same year, brought ejectment for a forfeiture incurred by not insuring in the joint names. No notice had been given to the lessee to alter the policy. *Held*,

That the covenant to insure in the joint names was a continuing covenant, and was not waived by the conduct of the lessor, except as to past breaches. And that the ejectment lay

EJECTMENT for messuages, &c., in Kent. Declaration of Trinity term, 1843: demise, May 18th, 1843.

On the trial, before Lord DENMAN, C. J., at the Maidstone *Spring
 assizes, 1844, it appeared that this ejectment was brought on the [*954
 alleged forfeiture of a lease by which defendant held the premises. The
 defendant was the widow and executrix of Thomas Gladwin. The lease
 purported to be granted, December 7th, 1819, by Lancelot Loat to Thomas
 Gladwin, his executors, administrators, and assigns, in consideration of the
 expense which the said T. G. had been at and put to in erecting and build-
 ing an ice well and other erections and buildings in and upon the piece of
 land or ground thereafter described and intended to be thereby demised:
 and also in consideration of the yearly rent and covenants thereafter
 reserved and contained, and on the part of the said T. G., his executors,
 &c., to be paid, kept, done, and performed. The term was thirty-five
 years; the rent 4*l.* 4*s.*, payable on the usual quarter days. The lease con-
 tained the following covenant by the lessee. "And also that he the said
 Thomas Gladwin, his executors," &c., "shall and will from time to time,
 and at all times during the said term, at his or their own expense, well and
 sufficiently insure and continue insured in the joint names of himself, his
 executors, administrators or assigns, and the said Lancelot Loat, his execu-
 tors, administrators or assigns, all erections and buildings, except the ice
 well before described, which shall or may during this demise be erected and
 built on the said premises hereby demised, or on any part thereof, during
 the said term, against loss or damage by fire, in some respectable insurance
 office," &c. There was a proviso for re-entry if Thomas Gladwin, his execu-
 tors, &c., should not perform all and every the covenants, &c. The lessor
 of the plaintiff alleged as a breach *of covenant(a) that the premises
 had not been insured or continued to be insured in the joint names [*955
 of the persons in whose joint names the same ought to have been insured.

The defendant became tenant on the death of Thomas Gladwin, and, on
 28th January, 1836, effected an insurance in her own name and in no other.
 The policy was continued in that form till the bringing of the present action;
 and the premium was paid, December 27th, 1842, for the ensuing year.
 The reversion of the demised premises came to George Oliver by assign-
 ment in 1837; and he assigned to the lessor of the plaintiff on 13th January,
 1843. In 1839, Oliver's attorney wrote to the defendant, requiring her to
 insure in her own name and that of Oliver: but it was proved on the defend-
 ant's part that, in the spring of 1840, the policy, in the defendant's sole
 name, was shown to and approved of by Oliver, and that he had subse-
 quently, and down to January, 1843, accepted rent from the defendant, the
 last payment being for the rent due at Christmas, 1842.

It was urged on the defendant's behalf that the alleged forfeiture had
 been waived by Oliver, and could not be enforced by the lessor of the
 plaintiff till after express notice to insure according to the covenant, which
 notice did not appear to have been given. The lord chief justice directed

(a) In a particular of breaches delivered under a judge's order.

a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant. *Platt*, in the ensuing term, moved accordingly; and a rule nisi was granted. In this vacation, (a)

*956] **W. H. Watson and Peacock* showed cause. The covenant to insure and keep insured was a continuing covenant; and, therefore, if there was a waiver of forfeiture by Oliver in 1839, that did not extend to subsequent forfeitures; *Doe dem. Flower v. Peck*, 1 B. & Ad. 428, proves both these points, and agrees with *Doe dem. Ambler v. Woodbridge*, 9 B. & C. 376. And the supposed assent here, if it went farther than the waiver of a past breach, must be relied upon as a parol dispensation with a contract under seal, which is contrary to the established rule of law; *West v. Blakeway*, 2 Man. & G. 729. Accord and satisfaction after breach is an answer to an action of covenant, but not accord and satisfaction before; Com. Dig. *Accord*, (A 1,) (A 2:) the reason is stated in *Blake's Case*, 6 Rep. 43 b, that, where the breach gives only a right of action for damages, accord after breach is only an acceptance of amends for the damages; but accord before is a dispensing with the covenant, which cannot be done by parol: and this doctrine was acted upon in *Kaye v. Waghorn*, 1 Taunt. 428. The distinction between waiver of a power of re-entry after breach and a prospective dispensation is also pointed out in note (16) to *Duppa v. Mayo*, 1 Wms. Saund. 288 a, b. *West v. Blakeway*, in an equitable view, was more strongly in favour of the defendant than this case, because there the party who brought the action had directly sanctioned the breach of covenant. Perhaps the transaction here between Oliver and the defendant might raise an equity between themselves: but it could not destroy the covenant as between the defendant and an assignee of the reversion. *Doe*

*957] *dem. Knight v. Rowe*, Ry. & M. 343, may be cited for the defendant. There the action was brought against the assignee in whom a lease granted to one Jones became vested under the Insolvent Debtors' Act; the lease contained a covenant to insure in the joint names of the landlord, (who was lessor of the plaintiff,) and Jones, in two-thirds of the value: and the ejectment was brought for a forfeiture incurred by insuring in defendant's name only, and in the sum of 800*l.*, which was less than the required amount. But the landlord had always kept the lease in his own possession, and had given Jones an abstract, which did not state in whose name or names the policy was to be effected; and, the year before the defendant's insurance was effected, the landlord had himself insured the premises, (Jones being unable to do so,) for 800*l.* ABBOTT, C. J., under these circumstances, left it to the jury to say whether the landlord's conduct in these respects might or might not have led a reasonable man to suppose that an insurance in one name only was sufficient, and that 800*l.* was two-thirds of the value; and directed them, if their opinion was in the affirmative, to find for the defendant. It is observed in Roscoe on Evidence,

(a) February 5th. Before Lord Denman, C. J., Patteson and Coleridge, Ja.

432,(a) that "this decision, however equitable, seems to be unsatisfactory in principle." But, assuming it to be correct, the case differs from this, because here the defendant knew the terms of the lease, and had been reminded of them by letter, and, if she was not informed of Oliver's assignment to Muston, might, at least, have insured in her own name and Oliver's. *Doe dem. Pittman v. Sutton*, 9 C. & P. 706, is also a different case from the present: there the lessee covenanted to insure, but the "lease provided that, if he made default, the landlord might insure, charge [958 the lessee with the premiums, and recover them by distress; and the lessee had reason to believe, from previous transactions with the landlord, that he had exercised the option of insuring and charging the premiums to the lessee. The landlord had misled him as to the matter of fact. *Doe dem. Morecraft v. Meux*, 4 B. & C. 606, may be cited for the defendant; but there the landlord, by giving the tenant notice to repair within three months, impliedly waived the power of re-entering for non-repair before the three months expired.

Bovill, contra. First, this case falls within the authority of *Doe dem. Knight v. Rowe*, Ry. & M. 343. ABBOTT, C. J., there said: "I am of opinion, that there is not in this case any dispensation or release from the covenant; nevertheless, if in this a case of forfeiture, the conduct of the lessor of the plaintiff has been such, as to induce a reasonable and cautious man to believe that he would do all that was necessary or required of him, by insuring in his own name and to the amount which has been proved, I am of opinion that, in point of law, the lessor of the plaintiff is not entitled to your verdict." "Knight might not have meant to deceive in this respect, but still if it would lead a reasonable man to the conclusion that has been stated, then as regards this ground of forfeiture, your verdict should be for the defendant." This ruling has, indeed, been questioned in *Roscoe on Evidence*, 432; but that of Lord DENMAN, C. J., in *Doe dem. Pittman v. Sutton*, 9 C. & P. 706, was to the same effect. *The principle is that of *Pickard v. Sears*, [959 6 A. & E. 469, and many other cases, in which it has been held that no action can be maintained for things done under a misconception which the plaintiff himself has assisted in creating. In *Doe dem. Morecraft v. Meux*, there were two independent covenants, to repair, and to repair on three months' notice, with a proviso for re-entry if either were broken. The defendant would clearly have been liable to ejectment under the first, but was held to be protected, because the landlord, by giving him notice to repair within three months, had led him to believe that he was in a state of security. Here the defendant acted on such a belief, created by Oliver, down to the end of 1842, when the premium for 1843 was paid; and no cause of complaint against her existed when the lessor of the plaintiff became landlord. [PATTESON, J. You do not put the landlord's conduct as

(a) 6th ed. tit. *Ejectment*. By Landlord.

(b) See *Doe dem. Rankin v. Brinley*, 4 B. & Ad. 84. *Doe dem. De Rutzen v. Lewis*, 5 A. & E. 277.

a dispensation; and yet you assert what clearly amounts to one; an engagement by the landlord that as long as the premiums are paid he will not enforce the covenant.] He may have precluded himself from it if his conduct has prevented the defendant from doing what she otherwise would have done. [Lord DENMAN, C. J. It had not led her to alter her situation.] Secondly, Oliver's conduct was an entire waiver of the covenant so far as it required insurance in the joint names. The covenant was to "insure and continue insured" in the joint names, &c., not to "insure and keep insured," as in *Doe dem. Flower v. Peck*, 1 B. & Ad. 428, where, it may be observed, no insurance appears to have been effected at all. Here, one policy *960] was to be executed and approved of, and then nothing *was to be done for the future but to continue the insurance by regularly paying the premiums. The policy in a single name was approved of by Oliver; and the insurance was duly kept alive. PARKE, J., delivering the judgment of the court in *Doe dem. Flower v. Peck*, said: "If this could be construed to be a covenant by the lessee to effect one policy of assurance immediately, and afterwards that he and his assigns should keep that particular policy on foot, by continuing to pay the annual premiums on that policy, the assignee would not have been guilty of any breach of covenant, if the lessee had never insured, for the policy never could have existed, which the assignee was to continue; and the distress for rent would have been a waiver of the breach by the original lessee. In such a case the lessor of the plaintiff could not have recovered." The present is analogous to the case there put. One policy was contemplated; and, if it was effected irregularly, the acquiescence of Oliver was a waiver. It could not be intended that a new policy should be effected as soon as the premises were assigned. At all events that could not be required unless a notice had been given to the tenant to alter the insurance. *Cur. adv. vult.*

PATTESON, J., now delivered the judgment of the court.

This was an action of ejectment on a forfeiture for breach of a covenant to insure in the joint names of landlord and tenant. The right to recover was clear, unless the lessor of plaintiff had by his conduct barred himself from proceeding.

The reversion in the property had often changed *owners. In *961] 1837 it was conveyed to Oliver, and on 13th January, 1843, by him to the lessor of the plaintiff. A policy was effected by the defendant on the 28th January, 1836, in the sole name of the defendant, which was kept alive by payment of the annual premium. At Christmas, 1842, the regular premium was paid for the ensuing year. There was no insurance in the joint names. The demise was laid in May, 1843. The defendant's son-in-law proved at the trial that, on the very day when Oliver parted with this property to the lessor of the plaintiff, he had paid Oliver the rent up to Christmas: he also proved that the policy effected had been previously shown to Oliver, who expressed himself perfectly satisfied with it.

Under these circumstances this ejectment must be considered as un-

sually harsh; and it is impossible for any court to lend itself willingly to enforce the proceeding. The expression that the law abhors a forfeiture was never more appropriate. But we must not forget that the legal rights of parties are all that we have power to deal with. Even the Court of Chancery has refused to enjoin against proceeding at law for breach of the covenant to insure; *Green v. Bridges*, 4 Sim. 96; and on occasions like the present, Lord TENTERDEN was in the habit of saying that we are bound to give all instruments their natural construction, and attach to them their legal consequences, whatever our inclinations may be.^(a) This course may operate severely in particular cases; but its general effect is no doubt beneficial, by teaching all that they must fulfil their engagements, and by giving certainty to their mutual relations.

*Since this lease, then, contains a proviso for re-entry in case of a breach of this covenant as well as that of others which may be [*962 thought more important, we have only to inquire whether it has been broken so that the landlord might maintain an action of covenant for the breach. That it has been broken is unquestionable: but the present landlord is said to be bound by the act of the former, who gave the defendant to understand that he should not require the performance of the covenant, but was satisfied with the substitution of a different mode of insuring. The case was likened to *Pickard v. Sears*, 6 A. & E. 469, and to some others, where it was held that a party may by his conduct so mislead another, and so affect his interests, as to deprive himself of the right to complain of what was afterwards done under an impression which he himself had produced; and a recent case of *Doe dem. Pittman v. Sutton*, 9 C. & P. 706, was particularly brought forward. It seems, however, sufficient to observe that no case has gone to the length of intimating that a breach of covenant can be justified by a parol license to break it. This would be to confound well established legal principles. The last named case of *Doe dem. Pittman v. Sutton*, which is cited as nearest to the present, is very plainly distinguishable when examined. There the covenant to insure on the tenant's part was qualified by an option given to the landlord to insure if the tenant made default, and to add the amount of premiums to his rent; and the evidence showed that the landlord had represented to the tenant that he had availed himself of this power by insuring. This representation would naturally induce *a belief that the insurance was actually effected [*963 according to the terms of the lease, in the manner which the landlord proposed. Against an action of covenant, the tenant might have defended himself by showing that the landlord prevented him from insuring, by representing that he had himself insured, and that, in fact, that peculiar covenant was not broken if the landlord's statement was true. The case of *Doe dem. Knight v. Rowe*, Ry. & Moo. 343, before Lord TENTERDEN was also much pressed on us in argument; but there the landlord had misled the tenant, by delivering to him a deficient abstract of the lease. But

(a) See *Doe dem. Davis v. Elham*, M. & M. 189.

in this case there is nothing but verbal evidence that a landlord had said that he would be satisfied though the covenant should be broken, which it indisputably was during the whole time that the premises remained uninsured according to the covenant; for the waiver by acceptance of rent could not operate beyond Christmas, up to which period that rent was accepted; and, this being a continuing covenant, a subsequent breach entitled the lessor of the plaintiff to re-enter: *Doe dem. Flower v. Peck*, 1 B. & Ad. 428.

We think, therefore, that the rule must be discharged.

Rule discharged.

*964]

•HOPKINSON v. JOHN JACKSON LEE.

Covenant, by one plaintiff, on a deed executed between *plaintiff and H.* of the one part, and defendant of the other part. The deed recited that defendant had applied to plaintiff to lend E., on mortgage, 2900*l.*, *moneys of H.*, then in plaintiff's hands, as trustee for H.: that plaintiff had declined, not being satisfied with the security for payment of interest, whereupon defendant offered the after mentioned covenant as further security, and *plaintiff and H., being satisfied* therewith, *agreed* to accept the same, and advance the 2900*l.*: That accordingly, by indenture of mortgage and assignment, to which E., the borrower, was party of one part, and plaintiff and H. respectively of other parts, in consideration of 2900*l.* paid by plaintiff to E. *out of such moneys of H.* as aforesaid, a policy of assurance and the dividends on certain Bank annuities were assigned to plaintiff, but subject to redemption, &c., with covenants by E. to pay principal and interest, and the premiums on the policy, and a proviso that, in default of payment of any such premium, plaintiff might pay the same, and repay himself the amount out of the Bank annuities. After these recitals, defendant, by the first mentioned deed, in pursuance of the agreement, and in consideration of the premises, and of plaintiff having advanced the 2900*l.* to E., covenanted, &c., *with and to plaintiff*, his executors, &c., *and also as a distinct covenant with and to H.*, her executors, &c., that defendant, subject to the proviso after mentioned, would pay five per cent. interest on the 2900*l.* until payment of the principal. Provided, and it was declared and agreed between and by the parties thereto, that the covenant was intended only as a security for so much of the interest as the dividends of the Bank annuities, &c., after payment of the premiums, should be insufficient to pay: and that, as between defendant and *the plaintiff and H.*, their executors, &c., such part of the dividends as should from time to time remain after payment of the premiums should first be applied in payment of the accruing interest, or so much as the dividends should be sufficient to pay, and that defendant, his heirs, executors, &c., should be liable on the covenant for so much only of the interest as the residue of the dividends should from time to time be insufficient to pay.

Held, that H. ought to have been joined as a plaintiff by reason of her joint interest, disclosed by the deed, in the subject matter of the covenant.

COVENANT. The declaration stated that on 1st August, 1840, by articles of agreement then made, &c., between Thomas Mann Lee and defendant of the one part, and plaintiff and Ann Caroline Hogg of the other part (profert:) After reciting that T. M. Lee and defendant, as the solicitors or agents of Emily de Coetlogon, Henry Hewgill, and Frances Emily his wife, had lately on their behalf requested plaintiff to lend to them 2900*l.* out of certain moneys of the said A. C. Hogg, then in his hands and held by him in trust for her, upon the security of an assignment by way of mortgage of such policy of insurance, Bank annuities, &c., as were thereafter mentioned; And that plaintiff, though otherwise willing to make such *loan on the security of such

*965]

proposed mortgage, yet, not being satisfied that the same was a suffi-

cient security for the interest to grow due on such sum of 2900*l.*, had declined to lend the same without some further security for payment of the interest, and whereupon T. M. Lee and defendant had proposed to enter into such covenant for further securing the same as thereafter contained; And "that the said plaintiff and the said A. C. Hogg, being satisfied with such further security, agreed to accept the same, and to advance the said sum of 2900*l.*" to E. de C. &c.; And accordingly, by indenture of mortgage and assignment bearing even date with the said articles, and made between Viscount Walpole and others (named) of the first part, the said E. de C. of the second part, Hewgill and his wife of the third part, plaintiff of the fourth part, and A. C. Hogg of the fifth part, in consideration of 2900*l.* to the said E. de C., H. Hewgill, and F. E. his wife, paid by plaintiff out of such moneys of the said A. C. Hogg as aforesaid, in the manner, &c., therein particularly mentioned, a certain policy of assurance, &c., on the life of E. de C., the dividends to accrue during her life on certain consolidated Bank annuities, her estate for life in certain Long annuities, and the estate or interest of Hewgill and his wife in a moiety of such Bank and Long annuities after the death of E. de C., were, in manner therein mentioned, assigned and conveyed to plaintiff, his executors, administrators, and assigns, but subject to redemption on payment by E. de C., Hewgill, and his wife, their executors, &c., to plaintiff, his executors, &c., of 2900*l.*, with interest at five per cent., at the time therein mentioned; and that in the said indenture were contained the usual covenants, on the part of the said *E. de C., [966 &c., for repayment of the principal and interest after the rate aforesaid by equal half-yearly payments, &c., and for payment of the annual premiums on the policy, and a provision authorizing plaintiff, his executors, &c., in case of default in payment of any of such premiums, to pay the same and repay himself the amount out of the said Bank annuities, &c. He, the defendant, by those articles of agreement, in pursuance of the said recited agreement in that behalf, and in consideration of the premises and of plaintiff having advanced and lent the sum of 2900*l.* to the said E. de C., H. H. and F. E. his wife at the request of the said T. M. Lee and the defendant as aforesaid, "did covenant, promise, and agree *with and to the said plaintiff, his executors, administrators, and assigns,*" that they, the said T. M. Lee and the defendant, but subject and without prejudice to the proviso or qualification thereafter in that behalf contained and in the declaration after mentioned, should and would in the mean time and until full payment of the said 2900*l.*, pay or cause to be paid unto plaintiff, his executors, &c., interest on the said 2900*l.*, or on such part or parts thereof as should from time to time remain unpaid after the rate of 5*l.* per cent. per annum, by equal half-yearly payments on 1st February and 1st August, and should and would make such payments without any deduction, &c.: Provided nevertheless, and it was thereby agreed and declared between and by the parties thereto, that the covenant and agreement thereinbefore contained was intended only as security for such part or parts of the interest

on the said 2900*l.* as the dividends or other annual proceeds or produce of the Bank annuities and other premises assigned as aforesaid, after first
 *967] paying or *deducting thereout the premiums from time to time to become due and payable on the aforesaid policy of insurance, should from time to time be insufficient to pay or satisfy; and that, as between T. M. Lee and the defendant, their heirs, executors, &c., and the said plaintiff and A. C. Hogg, their executors, administrators, and assigns, such part or parts of the aforesaid dividends, &c., as should from time to time remain after full payment and satisfaction of the premiums to become due or payable on the said policy of insurance, or any renewed or other policy of insurance to be effected in lieu thereof under the power in the said recited indenture in that behalf contained, should in the first instance be applied in payment and satisfaction of the interest from time to time to accrue due on the said 2900*l.* or any part thereof which from time to time might remain due and unpaid, or such part or parts of such interest as the same should be sufficient to pay; and that T. M. Lee and the defendant, their heirs, executors, &c., should be liable or chargeable on their aforesaid covenant for or in respect only of such part or parts of the aforesaid interest as such residue of the aforesaid dividends, &c., should from time to time be insufficient to pay.

Averment that, although the principal sum of 2900*l.* remained unpaid, yet T. M. Lee and defendant did not, nor did either of them, pay or cause to be paid to plaintiff such part of the interest on the said 2900*l.* as the dividends, &c., of the Bank annuities and other assigned premises, after making the payments and deductions, &c., were from time to time insufficient to pay, by equal half-yearly payments, &c., but they neglected, &c.:
 *968] *and that, on, &c., 145*l.* for one year's interest, &c., became and was due and payable to plaintiff under and by virtue of the said indenture; and that the dividends, &c., after deducting the premiums which became due, &c., (and which plaintiff paid and retained thereout, default in payment having been made by E. de C., Hewgill and his wife,) were, before and on the day and year last aforesaid, and thence have been, and are, insufficient to pay or satisfy the said sum so due for interest, by a large sum, to wit, &c., which became and was on, &c., due and payable from defendant and T. M. Lee to plaintiff under the said articles of agreement, and still is wholly due, &c., to plaintiff, contrary to the covenant, &c. And so the plaintiff saith, &c.

Plea, Non est factum. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the Kingston Spring assizes, 1844, it appeared that the material clause in the articles of agreement was in the following words:

"Now these presents witness that, in pursuance of the said recited agreement in this behalf, and in consideration of the premises, and of the said Jonathan Hopkinson," (the plaintiff,) "having so advanced and lent such sum of 2900*l.* to the said E. de C., H. H. and F. E. his wife at the request

of the said T. M. Lee and J. J. Lee as aforesaid, it is hereby agreed and declared between and by the parties hereto, and they the said T. M. Lee and J. J. Lee do hereby severally and respectively, and for their several and respective heirs, executors and administrators, covenant, promise and agree with and to the said Jonathan Hopkinson, his executors, administrators and assigns, and also as a distinct covenant with and to the said A. C. Hogg, *her executors, *administrators and assigns*, in manner following, that [969 is to say." Then followed the covenant set out in the declaration.

The defendant's counsel contended that the plaintiff must be nonsuited on the ground of variance; or because the action was brought against J. J. Lee only, whereas it appeared by the deed that A. C. Hogg was jointly interested in the subject matter. The lord chief justice gave leave to move to enter a nonsuit: and the plaintiff had a verdict.

Thesiger, in Easter term, 1844, moved for a rule to show cause why a nonsuit should not be entered; and he relied upon *Anderson v. Martindale*, 1 East, 497, as not distinguishable from the present case. He also moved to enter a verdict for the defendant on a ground which it is not material to state. A rule nisi was granted on both points.

In this vacation, (a)

Martin and *J. Arnould*, showed cause, and contended that no joint covenant appeared; that, in declaring on a contract under seal, if the terms of the instrument are unambiguous, they alone must guide, and no question can arise, as in cases of simple contract, as to the party from whom the consideration moved; and that, in the present case, the agreement itself declared the covenant with A. C. Hogg to be a distinct one from the covenant with the plaintiff. They cited note (1) to *Eccleston v. Clipsham*, 1 Wms. Saund. 155; note (c) to the same case in the 5th *edition of Serjt. Williams's Saunders, p. 155; and the addition to that note in ed. 6, 155 a; [970 and they relied upon *Sorsbie v. Park*, 12 M. & W. 146, and Mr. Preston's addition to Shepp. Touchst. 166, 7th ed., cited in the note on Saunders last referred to.

Knowles and *Wordsworth* supported the rule, and cited *Withers v. Bircham*, 3 B. & C. 254; *Southcote v. Hoare*, 3 Taunt. 87, and *Scott v. Godwin*, 1 B. & P. 67.

The rest of the authorities referred to, and arguments used, for and against the rule, will appear sufficiently by the judgment of the court, which was delivered in this vacation, (February 12th,) by

LORD DENMAN, C. J. The question is whether a nonsuit ought to be entered on account of the action being brought by the plaintiff only, when the covenant is, in contemplation of law, made by the defendant with the plaintiff and Ann Caroline Hogg jointly. That it is so made is argued from the authority of a very long series of cases, of which *Slingsby's Case*, 5 Rep. 18 b, is the leading one, though by no means the oldest; a case the more entitled to respect, because it is founded on a principle the reason of

(a) February 5th. Before Lord Denman, C. J., Patteson and Coleridge, Ja.

which is adopted and sanctioned in *Anderson v. Martindale*, 1 East, 497, by Lord KENYON, whose comment upon it, and whose consequent decision, received the silent acquiescence of the whole court. This case does not appear to have been overruled or questioned. It was acted upon in the Court of Error over which GIBBS, C. J., presided in 1818; *James v. Emery*, *971] 5 Price, 529, S. C. 8 Taunt. 245. *The same rule is laid down by Sheppard, in the Touchstone, 166.

But the last very learned editor, Mr. Preston, has there originated a doubt whether it is not expressed too generally. He refers to several cases, none of which impugn or qualify the rule, and, (which is truly remarkable,) does not even name *Anderson v. Martindale*. Mr. Preston introduces an exception not grounded on any judicial authority, viz., that the covenant must be ambiguous before that which is, *primâ facie*, either joint or several can be properly construed as several or joint according to the interest of the covenantees. He cites Salk. 393,(a) (which gives no countenance to the exception,) and 2 Roll. Abr. 419, which relates to a wholly different matter. (We have looked into 1 Roll. Abr. 419, which is under the head *Condition*, and 519, under that of *Covenant*; in neither place does this doctrine appear.)(b) Mr. Preston thus concludes his observations. "The general rule proposed by Sir Vicary Gibbs, and to be found in several books, would establish, that there was a rule of law too powerful to be controlled by any intention, however express." But we think there is no ground for Mr. Preston's apprehension that words perfectly plain and unambiguous, confining the contract expressly to one person, and excluding all others from its operation, will be strained by the law so as to comprehend those whom it took pains to exclude. The true explanation of the rule is rather this: that the whole covenant taken together binds to both covenantees and not to *972] either of them alone, though separately named in some of its *words, by reason of the joint interest in the subject matter of the action appearing on the face of the deed itself.

Such being the state of the authorities, a special case (c) was reserved from the assizes for the Court of Exchequer, where certain persons with whom a covenant had been made sued the covenantors upon it. The deed being fully set out, was found to make a covenant with the plaintiffs for themselves and others; and in Michaelmas term, 1843, the court held, in strict conformity with all the cases, that a nonsuit ought to be entered, because those others had not been joined as plaintiffs in bringing the action, though the covenant declared on was in its terms made with them alone. But the plaintiff here places his whole reliance on some dicta which fell from the late chief baron and from PARKE, B., applicable, not to that case, but only to the converse of it, which were represented as at variance with the old law. Unluckily, no reference was made to *Anderson v. Martindale*,

(a) *Robinson v. Walker*, 1 Salk. 393.

(b) Probably the reference intended by Mr. Preston is to 2 Roll. Ab. 149. *Obligation* (H)

(c) *Sorbie v. Park*, 12 M. & W. 146.

as the court, justly thinking the general rule too clear for argument, stopped the learned counsel who supported it. Lord ABINGER thought the rule plain and certain, and that it required no authority: "it is correctly stated by Mr. Preston:" he then cites the rule with the exception. (a) PARKE, B., also thinks the correct rule is laid down by GIBBS, C. J., in *James v. Emery*, 5 Price, 533, with the qualification stated by Mr. Preston. These learned judges could not intend to overrule *Anderson v. Martindale*, 1 East, 497, which was not *brought before them; nor, if they did, could we agree to be bound by their extra-judicially declaring [*973 such an intention where their decision itself pursued the doctrine of that case.

The instrument proved in this case recited that the defendant had borrowed of the plaintiff 2900*l.*, part of the moneys of Ann C. Hogg, then in his hands in trust for her, on the security of a mortgage of a policy of insurance and certain bank annuities and other valuable things, and that the plaintiff had required some further security, and thereupon the defendant proposed to enter into this covenant for further securing the same, and that *the plaintiff and A. C. Hogg were satisfied therewith, and agreed to accept the same, and to advance the said sum of 2900*l.**, and thereupon the mortgage had been executed in consideration of the same advance of 2900*l.*; and it was witnessed that, in pursuance of the said agreement, and in consideration of the premises and of the advance of the said sum to defendant, the defendant covenanted with the plaintiff, his executors, administrators, and assigns, "and also as a distinct covenant with and to the said A. C. Hogg, her executors, administrators, and assigns, in manner following," that is, to pay the plaintiff, his executors, administrators or assigns, regular interest on the 2900*l.* or such part thereof as should remain unpaid: Provided that this covenant should be only a security for such part of the said interest as the dividends or other annual income or produce of the Bank annuities and other premises assigned (after first paying the premiums on the policy) shall from time to time be insufficient to pay or satisfy; and that, as between *the two Lees, their heirs, executors, administrators, and assigns, and the plaintiff and A. C. Hogg*, their executors, administrators, and assigns, such part of the aforesaid dividends or income or annual produce as [*974 shall from time to time remain after full payment and satisfaction of the premiums of insurance shall, in the first instance, be applied in payment of the interest on the 2900*l.* The covenant is made with the plaintiff in relation to the security of 2900*l.*, the sole property of A. C. Hogg; and it binds the borrowers to pay, as between themselves on the one hand and the plaintiff and A. C. Hogg on the other, the deficiency between the income of bank stock and the premiums of the insurance.

The money lent in the case of *Anderson v. Martindale*, 1 East, 497, was

(a) Patteson, J., observed, during the argument of the present case, that the words "by several persons," in the judgment of Lord Abinger, 12 M. & W. 157, line 8, should be read "to several persons."

the consideration of the covenant to pay an annuity during the life of Elizabeth Wyatt; but the covenant itself was with the plaintiff's intestate, his executors, administrators, and assigns, and also to and with the said E. Wyatt and her assigns, to pay the plaintiff the annuity. This language as entirely confines the covenant to the plaintiff, and makes another separate covenant with E. Wyatt, as any words not directly exclusive can make it. In *Slingsby's Case*, 5 Rep. 18 b, the covenant was with certain persons named, and "ad et cum quolibet et qualibet eorum." No words can be stronger to give the plaintiff an option to sue all jointly or each separately. Yet in both the court held that, by reason of the joint interest in the subject matter of the suit, as disclosed in the deed itself, the action must be joint.

We think it would be a waste of time to argue that the words "as a distinct covenant" do not furnish any stronger inference of the intention to exclude than those just cited from those well known cases. If they *are still law, the present case must be decided against the plaintiff. We see no ground whatever for doubting whether they are.

We must not conclude without observing that the case of *Foley v. Addenbrooke*, 4 Q. B. 197, decided in this court in Hilary term, 1843, but not alluded to in *Sorsbie v. Park*, 12 M. & W. 147, probably because not then reported, is in exact conformity with the decision in that case and in this, and contains no doctrine at variance with *Anderson v. Martindale*, 1 East, 497, and the older authorities. Rule absolute to enter a nonsuit.

The QUEEN v. The Commissioners of Excise.

Although stat. 3 & 4 W. 4, c. 52, s. 40, in general terms authorizes importing into the United Kingdom any goods of the produce or manufacture of Guernsey, Jersey, &c., from the said islands on payment of countervailing duties, such goods are nevertheless subject in this country to the internal regulations and restraints which may be imposed by the Commissioners of Excise under sect. 52, so far as the same will apply to imported goods. (a)

And, the Commissioners of Excise having made an order that manufactured spirits of the Channel Islands of the denomination of British brandy or British compounds, (defined by stat. 6 G. 4, c. 80, s. 101, and 5 & 6 Vict. c. 25, s. 6,) should not be admitted by permit into the stocks of rectifiers and dealers in the United Kingdom, but that plain spirits, certified to be the produce and manufacture of those islands, might be so admitted, subject to all the regulations affecting British plain spirits, and care being taken that, under this order, no rectified or coloured or compounded spirit should be admitted,

Held, that the commissioners might legally refuse to grant permits for delivery to a dealer in London of spirits imported from Jersey, on request notes which did not sufficiently describe the spirits to show that they were admissible under the order.

Although, on application for a mandamus, it was stated on affidavit that the spirits were in fact made of materials the growth, produce, and manufacture of Jersey and of the United Kingdom; that the countervailing duty had been paid; and that delivery warrants from the proper officer of the customs had been lodged at the permit office.

HILL, in last Michaelmas term, obtained a rule nisi for a mandamus calling upon the Commissioners of Excise to grant permits for and in respect of the two casks *of spirits, imported from the Channel Islands, mentioned in the affidavit on which the rule was applied for.

(a) See stat. 8 & 9 Vict. c. 84, s. 2, and 8 & 9 Vict. c. 86, ss. 42, 55.

The affidavit, sworn by John Brodie, of St. Helier's, Jersey, distiller, stated that he, in last October, manufactured in Jersey one hogshead, containing fifty-six gallons, of plain spirits, not sweetened, of materials the growth, produce, and manufacture of the said island and of the United Kingdom. That, for the purpose of exporting the same, his partner made a declaration, before a magistrate of Jersey, that the spirits were made of materials the growth, produce, and manufacture of the island of Jersey and the United Kingdom only, and that no article of foreign growth or produce formed a component part thereof; which declaration was, according to the usage of the said island, delivered to the controller or collector of the custom house there, and to the lieutenant-governor of the island. That the lieutenant-governor thereupon granted a certificate of the proof contained in the said declaration, also stating the British ship *Atalanta* to be the ship in which, and Southampton the port of the United Kingdom to which, the spirits were to be exported; which certificate was delivered to the master of the *Atalanta*. That the spirits were accordingly imported into Southampton by the said ship. That deponent was informed, and believed, for reasons which he stated, that the master delivered the certificate to the controller of customs at Southampton, and made a declaration before such controller that the certificate was received by the master at Jersey, being the place where the said spirits were taken on board; and that the spirits were the same as were mentioned in the certificate. That the said spirits were afterwards sent from Southampton to the London Docks, where they remained under bond, and *that the proper entry thereof was made, and the full duty chargeable thereon, 23*l.* 2*s.* 2*d.*, (being at the rate of 7*s.* 10*d.* per gallon, proof,) paid to the proper officer at the custom house, London, by deponent's agent, who thereupon obtained from such officer a red ink duplicate of the entry of the said spirits, in which entry and duplicate are stated the particulars of the said spirits, with an acknowledgment written thereon of the payment of the said duty. [*977

The deponent then made a similar statement with respect to one hogshead of coloured spirits, not sweetened, containing fifty-five gallons, and exported from Jersey to London in the British ship *Navarino*.

He then stated that he was informed and believed that it is the usage and practice of the officer of the customs having the charge of goods, after the duty thereon has been paid, to transmit a warrant under his hand, containing a certificate of the particulars of such goods, and a duplicate thereof, to the proper officer of the customs at the London Docks, which duplicate is given to the permit officer of the excise at such docks, and is the sole authority for the latter to make out and deliver permits for the goods therein described. That deponent, with his attorney Mr. Curtis, called at the permit office of the excise at the London Docks, and the permit officer then informed deponent that he had received the duplicate warrants for the two casks of spirits above mentioned. That Mr. Curtis then asked the officer if he had all the documents requisite for granting the permits, and he said

he had. That Mr. Curtis thereupon requested permits; but the officer refused to give them, stating that he had a general order of the Board of Excise not to deliver permits for spirits of the Channel Islands without the special order of the *board, to be made on application in each case *978] and that he should have given the permits but for such order. Deponent stated that he then proceeded to the excise office, and saw the chairman of the Board of Excise, who stated that the refusal was pursuant to the order of the commissioners, and that permits would not be granted for either of the casks of spirits, or for any spirits the manufacture of the Channel Islands, made from materials the produce of the United Kingdom.

The affidavit lastly stated "that the spirits above mentioned were all manufactured from materials the produce or growth of the said island of Jersey and the United Kingdom only, and that no article of foreign growth or produce forms a component part thereof, and that the said spirits do not contain any substance, ingredient, or flavouring matter which will in any way prevent the strength thereof from being tested by Sykes's hydrometer;"(a) and that deponent believed that all the requisitions of the acts in force concerning the importation of Channel Island spirits into the United Kingdom had been complied with.

An affidavit in answer, by the permit writer at the London Docks, stated that, the spirits not being described in either of the warrants as plain spirits from the Channel Island of Jersey, and not being certified in each case to be the produce and manufacture of that island, and being respectively described in the said request notes(b) to be spirits, in the one cask of the *979] *strength of six per cent., and one-tenth of a per centum over proof, and in the other cask of the strength of fifteen per cent. and

(a) See *stats.* 58 G. 3, c. 28, 6 G. 4, c. 30, s. 101.

(b) The request notes, and the custom house delivery warrants, were subjoined to this affidavit. The request notes were as follows.

[A. B. No. 1.]

"Port of }
London. } 23d day of November, 1844.

"Duty paid. 25th October, 1844.

"I require a permit to remove to Mr. Walter Howell, of Mark Lane, 1 cask qt 6, 1 O. P. 55 gallons of spirits not sweetened, made of materials the growth, produce, and manufacture of the island of Jersey and of the United Kingdom only.

"Per cart.

Entered by J. Brodie & Co.
Per the railway from Southampton.
3 gallons over proof.
For J. Brodie & Co.
G. OWEN."

"Duty paid.

"Port of }
London. } 23d day of November, 1844.

"I require a permit to remove to Mr. Walter Howell, of Mark Lane, one cask qt 1½, 2 U. P. B. No. 2, 55 gallons of spirits not sweetened, made from materials the produce of Jersey

"Per cart.

Entered by Gilson & Co.
In the Navarino.
gallons over proof.
For John Brodie & Co.
G. OWEN."

centum under proof, such strengths respectively being
 with plain spirits are never imported into this part of
 either Scotland or Ireland, he was led to believe
 compounded or coloured spirits of the
 British compounds of the manufacture
 to whom permits were requested
 licensed spirit dealer in London
 persons thought it his duty
 the commissioners, dated
 and contained the following

Commissioners of Her Majesty's
 intimated that they do not con-
 sioners of Excise to admit by per- [*980
 s and dealers in the United Kingdom, any
 Channel Islands of the denomination of British
 pounds, as described in the act 6 G. 4, c. 80, and
 officers of this revenue must acquaint all persons engaged
 spirits under their survey accordingly."

or lordships having also signified to the Commissioners of
 plain Channel Islands' spirit, the produce and manufacture of
 ands, may be admitted into the stocks of traders under the deno-
 mination of British plain spirits, and subject to all the excise regulations as
 quality, quantity, and strength of such spirits in the United Kingdom, it
 is further ordered that all plain spirit from the Channel Islands, which shall
 be certified to be the produce and manufacture of those islands, be permit-
 ted into the stocks of traders as British plain spirits, subject to all the regu-
 lations affecting British plain spirits: care being taken that, under this
 order, no rectified or compounded or coloured spirit be admitted, or plain
 spirit of a strength exceeding twenty-five per centum over proof."

Mr. Wood, chairman of the Board of Excise, made affidavit that his
 statement, in the conversation with Messrs. Brodie and Curtis, that permits
 would not be granted for spirits the manufacture of the Channel Islands
 made from materials, (by which he meant British plain spirits,) the produce
 of the United Kingdom, was grounded on the above general order. He
 also stated that, at the time of the above conversation, he understood
 the spirits in question to be of the same quality and manufacture [*981
 as ten other casks of coloured Jersey spirits, which, having been imported
 by Mr. Brodie and his partner before the general order issued, were admit-
 ted as British brandy on being reduced to the legal strength. There were
 affidavits as to the composition of the spirits in the two casks, which it is
 unnecessary to state. In the last term, (a)

Sir F. Thesiger, solicitor-general, Jervis, and Waddington showed

cause. (a) "British spirits," "plain British spirits," "British brandy," and "British compounds" are defined by stat. 6 G. 4, c. 80, s. 101, and 5 & 6 Vict. c. 25, s. 6, and are liable to a duty of 7s. 10d. per gallon: a higher rate of duty is imposed on colonial spirits; and a still higher on foreign spirits. (b) Provision *is made, by stat. 6 G. 4, c. 80, (sects. 91, *982] &c.,) for the payment of countervailing duties on spirits distilled in Ireland or Scotland, and imported into England; and on goods the manufacture of the Channel Islands generally, so imported, by stat. 3 & 4 W. 4, c. 52, ("for the general regulation of the customs,") s. 40, which enacts:—

"That it shall be lawful to import into the United Kingdom any goods of the produce or manufacture of the islands of Guernsey, Jersey, Alderney, Sark, or Man, from the said islands respectively, without payment of any duty, (except in the cases hereinafter mentioned;) and that such goods shall not be deemed to be included in any charge of duties imposed by any act hereafter to be made on the importation of goods generally from parts beyond the seas: Provided always, that such goods may nevertheless be charged with any proportion of such duties as shall fairly countervail any duties of excise, or any coast duty, payable on the like goods the produce of the part of the United Kingdom into which they shall be imported: Provided also, that such exemption from duty shall not extend to any manufactures of the said islands made from materials the produce of any foreign (c) country, except manufactures of linen and cotton made in and imported from the Isle of Man."

The granting of permits for the removal of spirits from the place where they are kept into the stock of any dealer is regulated by stat. 6 G. 4, c. 80, s. 115, and the following sections, and by stat. 2 & 3 W. 4, c. 16, (for amending the law as to permits,) ss. 5, 6, 7. Sect. 5 of this last statute enacts: "That no permit shall be *granted by any officer of excise *983] until a request note or requisition in writing shall have been delivered by or in behalf of the person requiring such permit." By sect. 6, the note is to contain certain specified particulars, "together with such other par-

(a) They took a preliminary objection, that a mandamus did not lie to the Commissioners of Excise, the refusal having been by the excise officer acting under their directions, and the commissioners having given those directions under the order of a superior authority, the Commissioners of the Treasury. They cited *Rex v. The Commissioners of Customs*, 5 A. & E. 380. Hill and Gurney, contri, cited *Rex v. The Commissioners of Excise*, 2 T. R. 381; *Rex v. Collector of Customs*, 2 M. & S. 223; *Ashby v. White*, 2 Ld. Raym. 938; *Cullen v. Morris*, 2 Stark. N. P. C. 577; *Hurman v. Tappenden*, 1 East, 555; *Doswell v. Impey*, 1 B. & C. 163; *In re Baron de Bode*, 6 Dowl. P. C. 776. In the course of the argument Lord Denman, C. J., referred to *Barry v. Arnaud*, 10 A. & E. 646. The solicitor-general contended that it was not the duty of the Commissioners of Excise to grant permits, but merely to convey the directions of the Lords of the Treasury on this subject to the proper officer. The court intimated that, if it was thought right to insist on this objection, the other side ought to have time to look into it; and the solicitor-general ultimately waived the objection; and it was agreed that the rule should be discussed as if the application had been made against the permit officer, assuming him to be the person against whom, if at all, the writ ought to issue.

(b) See the enactments referred to in Bateman's *Laws of Excise*, 159: and stat. 5 & 6 Vict. c. 47. Table (A), Class XVIII.

(c) As to this term, the solicitor-general afterwards referred to stat. 5 & 6 Vict. c. 47, s. 15. See stat. 5 & 6 Vict. c. 56, s. 3.

particulars as the Commissioners of Excise shall from time to time direct or appoint, or as shall be required by any act or acts relating to the commodities in respect of which the permit shall be required:" and no permit is to be granted "on any request note which shall not be so signed, and contain the several particulars aforesaid." And by sect. 5, every permit granted without delivery of a proper request note, "shall be actually void."

Stat. 3 & 4 W. 4, c. 52, s. 52, adds this enactment. "And whereas it may be expedient to subject some sorts of goods imported into the United Kingdom to certain internal regulations and restraints after the full duties of customs have been paid thereon, and to place such regulations and restraints under the management of the Commissioners of Excise; be it therefore enacted, that no goods which are subject to any regulations of excise shall be taken or delivered out of the charge of the officers of customs, (although the same may have been duly entered with them, and the full duties due thereon may have been paid,) until such goods shall also have been duly entered with the officers of excise, and permit granted by them for delivery of the same, nor unless such permit shall correspond in all particulars with the warrant of the officers of the customs: Provided always, that such entry shall not be received by the officers of the excise, nor such permit granted by them, until a certificate shall have been produced to them of the particulars of the goods, and of the warrant for the same, under the hand of the officers of the customs who shall have the charge of the goods: Provided also, that if upon any occasion it shall appear necessary, it shall be lawful for the proper officers of excise to attend the delivery of such goods by the officers of the customs, and to require that such goods shall be delivered only in their presence; and it shall be lawful for such officers of excise to count, measure, gauge, or weigh any such goods, and fully to examine the same, and to proceed in all respects relating to such goods in such manner as they shall be authorized or required by any act for the time being in force relating to the excise." [*984]

Stat. 6 G. 4, c. 80, s. 124, forbids any dealer in British spirits to send out, or have in stock, any plain British spirits, except spirits of wine, of a strength exceeding twenty-five per cent. above hydrometer proof, or of a strength below seventeen per cent. under such proof, or any compounded spirits, except shrub, of a strength exceeding seventeen per cent. under hydrometer proof. Sect. 107 forbids the receiving of spirits in England from unauthorized persons, with a saving proviso for the case of foreign or colonial spirits, or spirits brought from Scotland or Ireland, but which does not comprehend spirits imported from Jersey.

The object of the legislature in stat. 3 & 4 W. 4, c. 52, s. 40, was to place goods manufactured in the Channel Islands on the same footing with goods the manufacture of Great Britain; but the ground on which this application proceeds is, that when spirits are imported from Jersey, if the countervailing duty has been paid, a permit must be granted, though the spirits may exceed or fall short of the strengths which would be allowed in

*985] the stock of a British dealer ; and that regulations of the *excise for ascertaining the quality of spirits so imported cannot be enforced. The license to which this construction must lead would be ruinous to the British trader ; and the precautions in sect. 52 were intended to prevent such a mischief ; for which purpose the excise officers are empowered to proceed in all respects as to the goods there mentioned, (of course including those imported under sect. 40,) as they may do by any act for the time being in force relating to the excise. A permit was necessary in this case ; and consequently a proper request note was necessary. The request notes here correspond neither with the directions of stats. 6 G. 4, c. 80, s. 115, and 2 & 3 W. 4, c. 16, s. 6, nor with the general order of the Board of Excise. The notes ought to have shown that the spirits were "British plain spirits," and not "rectified, or compounded, or coloured spirit," or "plain spirit of a strength exceeding twenty-five per centum above proof." The quality of the spirit is a fact within the knowledge of the importer ; and this has been considered in stat. 6 G. 4, c. 80, s. 101, where it is enacted that, if any question arise whether spirits removed by permit are *bonâ fide* such as are therein described, the proof that they are so "shall lie upon the owner or claimer thereof." It is consistent with the description of the manufacture given in these request notes, and in Mr. Brodie's affidavit, that the spirits may have been compounds within the definitions of the last cited clause. The second request note varies from the affidavit as to the materials. A question like the present, on the effect of stat. 39 & 40 G. 3, c. 67, (the Act of Union with Ireland,) sect. 1, article 6, was discussed in *The Attorney-General v. McKenzie*, 11 Price, 284, (a) and decided on the *986] *principle now contended for, that the statutory words ought to be construed with a view to the reciprocity of benefit and consolidation of commercial interests which the legislature intended to establish.

Hill and Gurney, contra. Much of the argument on the other side is inapplicable, because the Board of Excise here insists, not merely upon a certain form of request note, but upon the right of absolutely excluding, by refusal of a permit, goods of the produce or manufacture of the Channel Islands, which, on payment of the countervailing duty, are admissible by stat. 3 & 4 W. 4, c. 52, s. 40. The power claimed would, in a great measure, make this enactment nugatory. No ground is shown for excluding the articles prohibited by the general order from the stocks of rectifiers or dealers. Stat. 6 G. 4, c. 80, s. 107, does not point to such a prohibition. The importation under stat. 3 & 4 W. 4, c. 52, s. 40, may be subjected to some excise regulations by sect. 52, but not to such as may altogether prevent it. The alleged deficiencies in the request notes are not material in the case of goods imported under sect. 40, if the delivery warrants from the officers of customs are sufficiently full, and the request notes correspond with them, as they do here. Practically, the warrant is the real authority for the permit. (They then proceeded to argue that the particular defects

pointed out in the request notes were not fatal.) The definitions in stat. 6 G. 4, c. 80, s. 101, are immaterial in the case of goods imported under the general clause, 3 & 4 W. 4, c. 52, s. 40. [PARTESON, J. Then you would say that persons sending goods from Jersey, and paying the countervailing duties, are to be in a better situation *than persons here holding goods of the same description manufactured in this country.] Not [*987 in a better situation, but under different regulations. The directions of stat. 2 & 3 W. 4, c. 16, as to permits do not apply, that act relating (sect. 1) only to permits "for the removal or conveyance of any commodities, for the removal of which a permit is or shall be required by any act or acts" "relating to the excise:" and this cannot properly include regulations under stat. 3 & 4 W. 4, c. 52, which, as its title declares, is an act for "the general regulation of the customs."(a) [PARTESON, J. Your argument would show that no request note at all was necessary here.] It may go to that extent. The main question is, whether goods manufactured in Jersey from materials the produce of Jersey and the United Kingdom can, under stat. 3 & 4 W. 4, c. 52, s. 40, be imported on payment of the countervailing duty.

Cur. adv. vult.

Lord DENMAN, C. J., in this vacation, (February 12th,) delivered the judgment of the court.

This was an application for a writ of mandamus to the Commissioners of Excise to grant permits for the removal of two casks of spirits imported from the island of Jersey. A doubt was raised whether the writ could be issued to the commissioners; but it was not pressed; nor, from the view which the court takes of the statutes which have been cited as to the merits, is it necessary to determine the point.

These spirits were imported, and the proper duty paid for them, under sect. 40 of stat. 3 & 4 W. 4, c. 52. *His lordship here read the clause. (See p. 982, antè.) The spirits having been so imported, it is [*988 contended, by the Commissioners of Excise, that they are subject to all regulations of the excise in the same manner as spirits manufactured in England; and, amongst others, to the delivery of a request note under the fifth and sixth sections of stat. 2 & 3 W. 4, c. 16, for the obtaining a permit: and they further contend that the regulations of the excise have not been complied with in this case in several particulars. It seems clear that no sufficient request note has been delivered: but, for the applicant, it is contended that none was necessary. This depends upon the construction to be put upon sect. 52 of stat. 3 & 4 W. 4, c. 52, the same act which authorizes the importation of spirits from Jersey. His lordship here read the clause. (See p. 983, antè.) The express object of this section is to place imported goods under the internal regulations of excise applicable to similar goods the manufacture of this country; and we cannot doubt but that the same steps are necessary to obtain a permit from the officers of excise for

(a) (In this point it was observed on the other side that, although the act related to customs' duties, the regulations to be enforced under it by the excise were excise regulations.

delivery of imported goods, (so far as such steps can be applied to imported goods,) as are necessary in the case of goods manufactured here, although other matters are added by this section which are applicable only to imported goods. We are, therefore, clearly of opinion that, although the applicant did take all those steps which are enumerated in this section, yet he was not entitled to a permit, because he omitted to take the other steps which are required by the regulations of the excise, and, particularly, because he omitted to deliver a proper request note. This rule must be discharged.

Rule discharged.

*989]

*MITTELHOLZER v. FULLARTON.

Declaration in debt alleged: That, by agreement made, to wit, on 25th September, 1834, between plaintiff and defendant, in consideration of 7800*l.*, payable as after mentioned, plaintiff did sell, assign, transfer and make over all his right, title and interest in and to the services and labour of one hundred and fifty-three apprenticed labourers, formerly slaves, belonging to plaintiff, for and during the term of their apprenticeship, to defendant, his heirs, executors or assigns, and engaged to warrant and defend him from all claims and demands on, and, otherwise, as far as was in plaintiff's power, to guaranty the undisturbed possession of, the services of such labourers according to law: and defendant promised to pay plaintiff the 7800*l.* in six instalments of 1300*l.*, at specified annual periods: and it was agreed that, in case of failure in the regular payment of any instalment, plaintiff should be entitled to reclaim the services of such labourers during the remaining term of apprenticeship, and the services should revert to plaintiff, defendant remaining liable for such sums as should be then due for the value or hire of the labour during such period as defendant should have received the services, at the rate of 1300*l.* per annum. Averment, that defendant had the services, to wit, from the time of making the agreement for and during the term of the apprenticeship, and plaintiff was always ready and willing to warrant, &c., and did warrant, &c., and otherwise guaranty, &c., (in the terms of the agreement,) and defendant had undisturbed possession, &c., during the term, but, although defendant paid four of the instalments, and the time for paying the other two had elapsed, he did not pay, &c.

Held, by the Court of Queen's Bench, (on objection taken upon argument of demurrer to a plea,) that it did not appear, and the court would not intend in the absence of express statements, that the agreement was in any respect contrary to the law of England generally, or to stat. 3 & 4 W. 4, c. 73, s. 10: That, if the validity of the agreement depended on s. 10, the plaintiff was not bound to state that any act of assembly, &c., mentioned in that clause, had been made and complied with, or that none had been made: And that the declaration was good.

Judgment affirmed by the Court of Exchequer Chamber.

Plea 3 to the above declaration, that, during the term for which the services were transferred, and before either of the last instalments became due, plaintiff, against the will of defendant, removed the labourers from his plantation to that of plaintiff, and there detained them from thence hitherto, and defendant has never had their services since the removal: And, further, that defendant declined to pay the last two instalments, and failed in the regular payment of one, and thereupon the services of the labourers reverted to plaintiff according to the agreement; and that all sums due at the time of such failure for the value or hire of the labour while defendant had the services were paid.

Held, by the Court of Queen's Bench, on demurrer, a bad plea, as not showing that the plaintiff exercised his right to reclaim, on default made by the defendant.

Judgment affirmed by the Court of Exchequer Chamber.

Plea 1. That, before either of the last two instalments became due, the agreement was rescinded by and with the consent of plaintiff and defendant. Plea 4. That the agreement was made at Berbice in British Guiana, between British subjects, and was made for the purpose of transferring, and purported to transfer, the services of the one hundred and fifty-three labourers during their term of apprenticeship, according to the statute. That after such agreement, defendant had the services till 1st August, 1839: that in July, 1838, the governor and council of Berbice, according to the statute and the usages of the colony

made an ordinance that all persons who on 1st August, 1838, were apprenticed labourers should, from that day, be discharged from such apprenticeship; and thereupon, and before breach of the agreement, the labourers were discharged, &c., and the parties to the said agreement were prevented and prohibited by the authority aforesaid from further performing the same. Averment that defendant paid the instalments for the whole time during which he had and could by law have the services. Replication to plea 1, That the agreement was not by and with the consent of plaintiff and defendant rescinded. To plea 4, That the parties were not prevented or prohibited by authority of the said ordinance from further performing the agreement. Issues thereon.

On a special case, setting forth the pleadings and stating that the ordinance was made as pleaded, *Held*, by the Court of Queen's Bench, that the act of the colonial government, determining the apprenticeship, was not such a consent of British subjects in the colony as would support the averment of plea 1. And, as to plea 4, that the agreement was not a contract of hiring and letting, but an absolute contract for a sale and transfer of plaintiff's right to the services for a gross sum of money, due in present, though payable by instalments; and that plaintiff was entitled to the last two instalments, though the legislature had determined the apprenticeship before they became due. And that both issues must be found for plaintiff, and judgment entered accordingly.

Judgment affirmed by the Court of Exchequer Chamber.

Plea 2. That the agreement was made in Guiana, &c., and for the purpose, &c., (as in plea 4:) and that, before the agreement, an ordinance was made by the government of the colony, under stat. 3 & 4 W. 4, c. 73, and according to the laws and usages of the colony, enacting that no deed or instrument should be good or valid in law to pass or convey, or affect, the services of any apprenticed labourer, unless a memorandum of such deed, &c., were made in a book to be kept for that purpose in the colonial registrar's office within one month after executing such deed, &c. Averment, that such book was kept in the office, but that no memorandum of the said agreement was made according to the ordinance within one month after executing the agreement. Replication, that no book was kept for the purpose in the plea mentioned. Issue thereon.

Held, by the Court of Queen's Bench, that, although by the omission to register the agreement so far became void that the vendee could no longer claim the services, it was not void as to the vendor's claim for purchase money: that the vendee appeared to be the party who ought to have registered: and that, if the omission could have been a defence, the plea ought to have shown that the duty of registering lay on the plaintiff. And, a verdict having been taken for defendant on the last mentioned issue, the court gave judgment for the plaintiff non obstante verdicto.

Judgment affirmed by the Court of Exchequer Chamber.

DEBT. The plaintiff, as surviving partner of Johann Ludewig Barnstedt, alleged, in the first count of the declaration, that heretofore, viz. 25th September, *1834, by a certain agreement made and entered into [*990] between plaintiff and the said J. L. Barnstedt of the one part, and defendant of the other part, it was contracted and agreed: That, for and in consideration of 7800*l.* sterling money of Great Britain and Ireland, payable in manner as thereafter expressed, the parties of the one part had bargained and sold, and they did thereby sell, assign, transfer and make over all their right, title and interest in and to the services and labour of all those one hundred and fifty-three apprenticed labourers, formerly slaves belonging to the parties of the one part, whose names and classification were set forth in a schedule thereunto annexed, for and during the term of their apprenticeship, to and in favour of the party of the other part, on behalf and to the use of his plantations, or his heirs, executors or assigns, the parties of the one part promising and engaging to warrant and defend [*991] the party of the other part from all claims and demands on and otherwise in as far as was in their power to guaranty the quiet and undisturbed possession of the services of such apprenticed labourers, according to law.

That the party of the other part promised and engaged to pay or cause to be paid to the parties of the one part, his heirs or assigns, the aforesaid sum of 7800*l.* sterling in six instalments, namely, on 12th of January, 1836, 1300*l.*, &c., (the like instalment on every 12th of January successively till January, 1841;) each of the said instalments to bear five months' and twelve days' interest at six per cent., and, in the event of not being punctually paid, to bear further interest from the dates they respectively became due until fully satisfied and discharged. That it was mutually understood and agreed between the parties that, in case of failure in the regular and prompt payment of any of the said instalments, the parties of the one part should be entitled to reclaim, and the services of such apprenticed labourers during the then remaining term of apprenticeship should revert to them the said parties of the one part, their heirs or assigns, the party of the other part and his property remaining nevertheless bound and liable for the payment of such sums as should be then due for the value or hire of the labour during such period as they should have received the services of the said apprenticed labourers, at and after the rate of 1300*l.* sterling per annum, and to be moreover bound to make good any losses which might be thereby sustained. And the plaintiff in fact said that although, after the making of the said agreement, the services and labour of the said apprenticed labourers *were, in pursuance of the said agreement, had, used and enjoyed

*992] by defendant, to wit, from the time of making the said agreement for and during the term of their apprenticeship, and plaintiff and J. L. B. before the death of J. L. B., and plaintiff since that time, were at all times ready and willing to warrant and defend, and did warrant and defend, the defendant against all claims and demands on him in respect of the said apprenticed labourers, and did otherwise guaranty as far as it was in their power the quiet and undisturbed possession of the services of such apprenticed labourers according to law, and defendant in fact had such quiet and undisturbed possession thereof for and during the term aforesaid, and although defendant, in part performance of the said agreement and covenant on his part, paid to plaintiff and J. L. B. four of the said instalments at the several times when the same respectively became payable, and although the times for payment of the remaining instalments had severally elapsed before the commencement of this suit, yet defendant has not paid the said remaining instalments or either or any part thereof, but the same, amounting to a large sum, viz., 2600*l.*, and a further large sum for the interest, &c., are still wholly due and unsatisfied to plaintiff, whereby an action, &c., to demand, &c., 3000*l.*, parcel, &c.

Second count for 3000*l.* due on an account stated.

Pleas: 1. To the first count. That, before the remaining instalments therein mentioned, or either of them, became due and payable, viz. on 23d July, 1838, the said agreement was, by and with the consent of plaintiff and the said J. L. Barnstedt, and of defendant, wholly annulled and rescinded. Verification.

Second plea, to the first count. That the said agreement *was made in writing in and by a certain instrument bearing date and [993 made and executed upon a certain day, to wit 25th September, 1834, and that the said instrument was made and executed in parts beyond the seas, to wit in the colony of British Guiana, to wit in the district of Berbice in the said colony; and the said instrument was made and executed for the purpose of transferring and affecting, and was intended to transfer and affect, the service of divers, to wit one hundred and fifty-three, apprenticed labourers in the said colony, to wit the apprenticed labourers in the declaration mentioned. And that, before the making of the said instrument of sale and agreement, to wit on 8th March, 1834, to wit in the said colony of British Guiana, a certain ordinance for the government and regulation of apprenticed labourers was duly made and executed by his excellency Sir James Carmichael Smith, baronet, lieutenant-governor and commander in chief of the said colony, by and with the advice and consent of the honourable Court of Policy of the said colony, in compliance with and in conformity to the provisions of an act, &c., (3 & 4 W. 4, c. 73,) intituled "An act for the abolition of slavery throughout the British colonies; for promoting the industry of the manumitted slaves; and for compensating the persons hitherto entitled to the services of such slaves," and according to the laws and usages established and in force in the said colony, which said ordinance was also duly published on a certain day, to wit 22d July, 1834. And that, among other things, it was enacted, by and in the said ordinance, that from and after 1st August, 1834, no deed or instrument whereby the services of any apprenticed labourer or labourers in the said colony should be transferred or affected, or intended *to be transferred or affected, should be good or valid in law to pass or convey [994 or affect the services of any such apprenticed labourer or labourers, unless an annotation or memorandum of such deed or instrument should be made or recorded in a book to be kept for that purpose in the colonial registrar's office of each of the respective districts in the said colony within one month after the making or executing such deed or instrument, if made or executed in the said colony. Averment that although before and at and after the making of the said instrument and agreement, to wit on 1st August, 1834, and from thence hitherto, a book was and has been duly kept for the purpose last aforesaid in the colonial registrar's office, to wit of the district and county of Berbice in the said colony, within which district the said instrument was made and executed, and within which the services of the said apprenticed labourers were intended to be transferred and affected, yet no annotation or memorandum of the said instrument of sale, transfer and agreement was made or recorded, according to the provisions of the said ordinance, in the colonial registrar's office in the district of Berbice in the said colony, within which district the said instrument and agreement was made and executed, and within which the services of the said apprenticed labourers were intended to be assigned and transferred and made over, nor

elsewhere in the said colony, within one month after the making or executing such instrument, or at any other time before the commencement of this action. Verification.

Third plea, to the first count. That, after the making of the said agreement, the said apprenticed labourers came into and remained in the service of defendant, *to wit on 1st October, 1834, and from thence until *995] 1st August, 1838; and afterwards, to wit on the day and year last aforesaid, without the consent and against the will of defendant, and before the expiration of the time for which the services of the said apprenticed labourers were originally transferred and conveyed by and according to the true intent and meaning of the said agreement, and before either of the remaining instalments in the declaration mentioned became payable, the plaintiff took away and removed the said labourers in certain boats and vessels belonging to the plaintiff, from and out of the plantations of the defendant wherein the said apprenticed labourers had been and were up to that time usually employed, and conveyed and removed them to the plantations and premises of the plaintiff, and there employed and detained them in his service for a long space of time, to wit from that time hitherto; and defendant ceased to have and receive the services of the said apprenticed labourers, and has at no time since had or received the services of them or of any of them, and the said apprenticed labourers wholly quitted and abandoned the service and employment of defendant in manner aforesaid, to wit on the day and year last aforesaid. And defendant further saith that defendant declined to pay the two last instalments in the declaration mentioned, and did in fact fail in the regular and prompt payment of one of the instalments in the said agreement and in the said declaration mentioned, to wit in the payment of the fifth instalment, and thereupon the services of the said apprenticed labourers reverted to plaintiff and the said J. L. Barnstedt, their heirs and assigns, according to the terms and provisions of the said instrument and *agreement. And defendant further saith that all *996] such sums as were then due, to wit at the time of the failure in the regular and prompt discharge of the said fifth instalment, for the value or hire of the labour during such period as the defendant had received the services of the said apprenticed labourers, at and after the rate of 1300*l.* sterling per annum, were and have been duly and fully paid and discharged according to the terms and provisions of the said instrument or agreement, to wit by the payment of the four first instalments in the declaration and in the said agreement mentioned, together with interest thereon after the rate and for the time and upon the days and years in that behalf in the said agreement and in the declaration specified, and according to the terms and provisions thereof respectively. Verification.

Fourth plea, to the first count. That the said agreement was made in writing in parts beyond the seas, to wit in the colony of British Guiana, to wit on the day and year in the said declaration in that behalf mentioned, and the parties thereto were British subjects, and the said written sale and

agreement, to wit on, &c., was made for the purpose of transferring the services of divers, to wit one hundred and fifty-three, prædial apprenticed labourers, and purported to transfer and assign the services of the said labourers, to wit the said apprenticed labourers in the declaration mentioned, during the term of their apprenticeship, that is to say from the date of the said sale and agreement, to wit from 25th September, 1834, until 1st August, 1840, to which last mentioned day the term of the said apprenticeship then extended, according to the terms and provisions of an act, &c., (3 & 4 W. 4, c. 73.) That, after the making of the said agreement, defendant *had and received the services of the said apprenticed labourers, to wit from the date thereof until 1st August, 1838; that, [*997 while the said apprenticed labourers were in the service of defendant under the terms of the said sale and agreement, to wit on 23d July, 1838, a certain ordinance was duly made and executed by his excellency Henry Light, Esq., governor and commander in chief in and over the colony of British Guiana, vice-admiral and ordinary of the same, &c., by and with the advice of the honourable Court of Policy of the said colony, in conformity with the provisions of the act passed, and according to the laws and usages established in the said colony, which said ordinance was also duly published, to wit on the day and year last aforesaid; and it was, amongst other things, by the said ordinance enacted that all and every the persons who, on 1st August, 1838, should be holden within British Guiana as prædial apprenticed labourers should, upon and from and after 1st August, 1838, become free to all intents and purposes whatsoever, absolutely freed and discharged of and from the then remaining term of their apprenticeship created by the act aforesaid, and of and from all and every the obligations imposed on them by the said act. And thereupon, afterwards, and before any breach of the said agreement, to wit on 1st August, 1838, the said apprenticed labourers were freed and discharged from their apprenticeship, and defendant was wholly deprived of their services, and the parties to the said sale and agreement were prevented and prohibited by the authority aforesaid from further performing the said agreement, or from carrying the said sale and transfer of the services of the said labourers into any further operation for the remainder of the said intended *term of the apprenticeship according to the true intent and meaning of the said sale [*998 and agreement, to wit from 1st August, 1838, up to 1st August, 1840. And defendant saith that, during all such time as the said apprenticed labourers remained in his service, and during all the time that their services could by law be had and received and retained by him according to the terms of the said sale and agreement, to wit from the day of the date of the said agreement up to the said 1st August, 1838, defendant duly paid all instalments, together with interest thereon, when and as they became due, according to the terms of the said agreement and before the commencement of the said action, to wit the three first instalments in the said declaration and in the said agreement mentioned, to wit on the days and

years in that behalf in the said declaration and in the said agreement specified respectively; and, afterwards, and after the said 1st August, 1838, and after the said apprenticed labourers had been freed and discharged by the ordinance last aforesaid, and after defendant had been deprived of their services, defendant also duly paid the said fourth instalment in the declaration and in the agreement specified, together with the said interest thereon, to wit in respect of the services of the said labourers had and received by him from and after the time of payment of the third instalment, to wit upon the day and year in the said agreement and declaration specified for payment of the said fourth instalment. Verification.

Fifth plea, to the last count. Never indebted. Conclusion to the country.

Replication to the first plea. That the said agreement was not by or with the consent of the plaintiff and the said J. L. Barnstedt, and of defendant, annulled *or rescinded, in manner and form, &c. Conclusion to *999] the country. Issue thereon.

To the second plea. That there was not, nor has been, any book kept for the purpose in that plea mentioned in the colonial registrar's office, in manner and form, &c. Conclusion to the country. Issue thereon.

To the third plea. Demurrer, assigning, for causes, that the said plea is multifarious and uncertain, and contains several distinct and independent allegations, and is so framed that the plaintiff cannot safely or properly take any issue thereupon. That it is wholly uncertain on which of the allegations of the said plea the defendant intends to rest his defence. That the first allegation thereof is an argumentative traverse of the averment in the declaration that the defendant had used and enjoyed the services of the said apprenticed labourers during the term of their apprenticeship. That the allegation thereof sets up the default of the defendant himself as defeating the right of the plaintiff. That the said plea does not either traverse any material averment of the declaration, or confess and avoid the statement thereof. That, inasmuch as the complaint in the declaration is confined to the non-payment of the two last instalments, the matters in the said plea alleged amount to a denial that the debt ever accrued, and ought to have been pleaded accordingly. And that the said plea is in other respects, &c. Joinder in demurrer.

To the fourth plea. That the parties to the said agreement were not prevented or prohibited by the authority of the said ordinance in that plea mentioned from further performing the said agreement, in manner, &c. Conclusion to the country. Issue thereon.

*To the fifth plea, similitur.

*1000] The demurrer was argued in Trinity term, 1842.(a)

Kelly, for the plaintiff. First, the third plea tenders an argumentative traverse, and of an immaterial averment. The substance of the recited agreement is, that, in consideration of 7800*l.*, payable as after mentioned, the plaintiff

(a) May 31st and June 3d. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js

sells and assigns his right to the services of the apprenticed labourers, and the defendant promises to pay 7800*l.* to the plaintiff in six instalments. Supposing that the alleged guarantee on the plaintiff's part amounted to a condition precedent, the effect is only that he warrants the defendant against claims and demands: and it would have been sufficient to aver, in the declaration, that the plaintiff always was ready so to warrant, &c., and did guaranty the quiet possession as far as was in his power. He does, indeed, go on to aver that the defendant, in fact, had the quiet possession; but, even assuming this to have been a necessary allegation, the defendant was bound either to traverse, or confess and avoid it, he has done neither, but attempts to deny it argumentatively. [PATTESON, J. The guarantee certainly seems to mean a warranting against others; then the plea is like a plea of eviction.] The case of eviction from real property is peculiar, and not analogous to this. If I let goods to hire for a year, and then take them away again for two months, that is no answer to an action for the hire, unless it be made so by special contract. In this case, to raise the question properly, an averment by the plaintiff that he guaranteed the quiet possession should have been answered by the *defendant's averring that he did not, and that defendant had not the quiet possession, but plaintiff took the labourers away. [*1001 And (though this is not directly stated as a ground of demurrer) the plea, if it properly met the averment of performance on the plaintiff's part, should have concluded to the country.

But the substantial question is, whether it be an answer to this action that the plaintiff took away the labourers. Now the contract clearly does not make it a condition precedent to the full performance on the defendant's part that the labourers shall continue in his service. The plaintiff conveyed the services for an entire sum, which would have been payable at once but for the provision as to instalments. His right to the whole accrued as soon as the contract was executed: any default on his part would have been the subject of a cross action. The agreement is not for a hiring of the labourers at so much a year; it is a sale of whatever interest the plaintiff had in their services. The first rule laid down in note (4) to *Pordage v. Cole*, 1 Wms. Saund. 320 b, 6th ed., (a) decides this case. In *Boone v. Eyre*, (b) the plaintiff conveyed to the defendant by deed a plantation in the West Indies, with the negroes on it, in consideration of an annuity, and covenanted for title; and the defendant covenanted that, "plaintiff well and truly performing all and every thing therein contained on his part to be performed," he, defendant, would pay the annuity. To a declaration in covenant for non-payment, defendant pleaded that plaintiff was not at the time of making the deed legally possessed of the negroes, and so had not good title to convey. On demurrer, Lord MANSFIELD said: "The distinction is *very clear, where mutual covenants go to the whole of the [*1002

(a) See *Hall v. Bainbridge*, 5 Q. B. 233.

(b) Note (a) to *Duke of St. Alban's v. Shore*, 1 H. Bl. 273. See *Franklin v. Miller* 4 A. & E. 599.

consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed any one negro not being the property of the plaintiff would bar the action." And the plaintiff had judgment. The same point is assumed in *Boone v. Eyre*, 2 W. Bl. 1312, in the Common Pleas. If the plaintiff here took away the labourers during the term, the damages were unliquidated: no one could say beforehand how much of the 7800*l.* would have to be deducted. The defendant cannot stop short of arguing that, if the plaintiff's contract was unfulfilled even as to one labourer, the whole 7800*l.* was to be forfeited.

But, further, the plea is double; and the matter which it sets up in the second place is no defence. It first states that the plaintiff wrongfully took away the labourers, and then that the defendant made default in payment, and thereupon the services reverted to the plaintiff. The reverter must have taken place on the default, not before. The defendant was bound to pay the fifth instalment, and did not do so. Then it was in the plaintiff's option, not the defendant's, whether or not the services should revert; and the plea does not show any option exercised by the plaintiff. A party cannot allege his own default to avoid a contract; *Rede v. Farr*, 6 M. & S. 121; *Malins v. Freeman*, 4 New Ca. 395; *Doe dem. Bryan v. Bancks*, 4 B. & Ald. 401; *Roberts v. Davey*, 4 B. & Ad. 664. [PATTESON, J., mentioned *Arnsby v. Woodward*, 6 B. & C. 519.]

*1003] *J. Greenwood*, contra. The third plea does not deny the performance of any condition precedent; nor does the defendant assert that failure of performance by the plaintiff in any one particular would have disentitled him to the whole 7800*l.* The plea is not multifarious: it contains a narrative in which several matters make up one entire defence, the earlier statements being only inducement to the latter. Such a plea is not objectionable; Com. Dig. *Pleader*, (E 2,) *Rowles v. Lusty*, 4 Bing. 428. The defence is substantially an excuse of non-payment; and on that the plaintiff might have taken issue generally, as appears from *Purchell v. Satter*, 1 Q. B. 197. He might have replied that the services did not revert. The plea, therefore, as framed, does not subject the plaintiff to any difficulty. It is not an argumentative denial of an averment that the defendant had and used the services during the apprenticeship; for there is no effective averment of that fact, the statement being guarded by a videlicet. Besides, the allegation, if made, was immaterial, and a traverse of it would have been absurd. Therefore a defence inconsistent with it is necessarily bad. [PATTESON, J. The objection taken is that you answer by affirmative matter without a negative before it, and that this is wrong, though the negative might be immaterial.] The plea confesses and avoids. A plea, though it does not deny the matter of the declaration, may be good in confession and avoidance if it answers the declaration by matter ex post facto; *Carr v.*

Hinchliff, 4 B. & C. 547. There the facts might have been given in evidence under the general issue; and it follows from the judgments of BAYLEY, HOLROYD, and LITTLEDALE, Js., that a *party may, instead of the general issue, plead matter of mixed fact and law [*1004 arising ex post facto, and conclude with a verification. The defendant, therefore, in the present case, was not obliged to take a traverse concluding to the country. [PATTESON, J. Your deduction from the judgment in *Carr v. Hinchliff* is very large. At that time the general issue, in many cases, was not a simple traverse, but let in matter which admitted the contract.]

As to the argument that the defendant sets up his own default against the plaintiff's right: *Rede v. Farr*, 6 M. & S. 121, and the other cases of that class are not disputed. But the defence is incorrectly represented. The agreement is, that, if the vendee fails in payment, the vendor may reclaim the labourers, and the vendee shall pay for the value of the labour down to that time only. The argument for the plaintiff is that no reclaimer appears by the plea; but the facts stated show it. [Lord LENMAN, C. J. Does the plea say that the plaintiff took away the labourers before the default? PATTESON, J. It pointedly alleges a wrongful taking; for it states the taking to have been "before either of the remaining instalments" "became payable."] It alleges that the defendant failed to pay the fifth instalment, and thereupon the services reverted. The plea shows in substance that the plaintiff took away the labourers under a claim, and that that claim was grounded on a default. [PATTESON, J. As you would construe the plea, it alleges the default to have been before the taking and after the taking. The plaintiff could not claim the labourers after he had got them. COLERIDGE, J. You give no effect *to the words in the agreement "should be entitled to reclaim."] The intention of the agreement was to give [*1005 either party an option of declaring it at an end. [COLERIDGE, J. Is it reasonable that the defendant should be empowered to say "If I do not pay you, the labourers shall come back to you whether you will or not?"] The agreement supposes a state of facts in which a new arrangement may be made, so that neither party shall be a loser. [PATTESON, J. As you put it, it is all for you and all against the vendor. If the vendee finds the bargain bad, he has nothing to do but fail in payment.]

Then, further, the first count of the declaration is bad, as proceeding upon a contract on which no legal promise can be grounded. There is nothing to show that the transaction was to take effect out of Great Britain; and, in this country, apprentices could not be assigned in the manner here pointed out. This appears sufficiently from *Rex v. Spreyton*, 3 B. & Ad. 818. But, if stat. 3 & 4 W. 4, c. 73, is to be taken into consideration, sect. 10 enacts: "That the right or interest of any employer or employers to and in the services of any such apprenticed labourers as aforesaid shall pass and be transferable by bargain and sale, contract, deed, conveyance, will, or descent, according to such rules and in such manner as shall for that purpose be provided by any such acts of assembly, ordinances, or

orders in council as hereinafter mentioned." The declaration ought to have shown that an ordinance was made, and that this agreement was within its sanction. And, generally, the plaintiff, relying on such a contract, ought to have set forth facts which rendered it legal.

*1006] *Lord DENMAN, C. J. On the construction of the third plea we have not the least doubt, and we think it insufficient.

As to the last objection, no notice has been given of it as a matter to be argued. The plaintiff's counsel may reply, on this point, on the next special paper day.

Kelly in reply. (a) The declaration, in describing the apprentices as "all those one hundred and fifty-three apprenticed labourers, formerly slaves," "whose names and classification were set forth in a schedule," gives them a designation recognised by law; for stat. 3 & 4 W. 4, c. 73, s. 1, after reciting the expediency of setting free divers persons holden in slavery within divers of his majesty's colonies, enacts that all persons duly registered as slaves in any such colony, and of or above a certain age, shall, by virtue of the act, "become and be apprenticed labourers:" sect. 4 provides for the division of "all such apprenticed labourers" into three classes; and by sect. 10 the right to the services of the apprenticed labourers is made transferable. The court will not, for the purpose of defeating this contract, make so violent a presumption as that these labourers were apprentices in England. Even assuming that the contract, as set forth, is not shown to have been one that could have been enforced as an executory contract, it is declared upon as an executed contract; the plaintiff has assigned his interest, has warranted and defended the defendant's possession; and the defendant has enjoyed the full benefit of the transaction. What authority, then, is there for saying that the plaintiff, "there being nothing *criminal in the contract," "should not have the benefit of it, where he has in fact performed it?"—to adopt the language of Lord ABINGER in *Wallis v. Day*, 2 M. & W. 273, 276, a case which turned on the validity of a covenant to serve the covenantee for the life of the covenantor. The principle that a party may recover on an executed contract, when neither criminal nor illegal, though neither party might have been able to enforce the execution of it, was acted on in *The Mayor of Stafford v. Till*, 4 Bing. 75, and *The Mayor, &c. of Carmarthen v. Lewis*, 6 C. & P. 608, and was recognised in *Bird v. Higginson*, 2 A. & E. 696, 704. (b)

It is argued that the declaration is bad for not showing compliance with any rules provided by act of assembly: but the right of the employer to assign his interest is not a new right conferred upon him by the act of parliament: he had previously a much larger right, which is limited by the act; therefore, in declaring upon such a contract, he need not allege compliance with regulations introduced by the statute, but any non-compliance therewith must be shown on the other side by way of plea. Thus it is not

(a) June 3.

(b) Judgment affirmed in the Exchequer Chamber, *Bird v. Higginson*, 6 A. & E. 694

necessary, in declaring on a will, to state that the solemnities required by the Statute of Frauds have been observed; 2 Chitty on Pleading, 426, note (u), tit. *Declarations in Covenant*, (7th ed.) So, in declaring on a guarantee, or on a contract for the sale of goods within the Statute of Frauds, it is not necessary to show that there was a contract in writing. Stat. 3 & 4 W. 4, c. 73, is for compensation to the employers, as well as for the emancipation of the slaves; and, by sects. 7, 8, 9, many other transactions in which *the employers have an interest are to be effected in such manner as shall be prescribed by act of assembly. [*1008 Suppose the assembly should make no regulations, are the parties thereby to be deprived of the benefits designed for them by the statute, and are contracts in that behalf which would have been good at common law to become void? [COLERIDGE, J. The contract, under sect. 10, must be such that the apprenticed labourer shall not be "liable to be separated from his or her wife or husband, parent or child."] Non-compliance with that provision should appear by way of answer to an action. Besides, the declaration here does not show an absolute contract for the services of the apprenticed labourers, but a contract for all the right, title, and interest of the plaintiff and his deceased co-proprietor: nothing illegal would pass under such a conveyance; the services which are warranted are services according to law, and nothing further: the court will not presume that the contract was to do an illegal act; *Lewis v. Davison*, 4 M. & W. 654.

Cur. adv. vult.

Lord DENMAN, C. J., in the ensuing vacation, (June 25th,) delivered the judgment of the court.

After disposing of the points stated for argument on demurrer to one of the pleas, we were moved to pronounce the declaration bad, as founded upon an illegal contract therein set forth, purporting to sell, assign, transfer, and make over all the plaintiff's right, title, and interest in and to the services and labour of a hundred and fifty-three apprenticed labourers, formerly slaves, to and in favour of the defendant, and to the use of his plantations. Though *we could not doubt that these apprenticed labourers had been slaves in the West Indies, emancipated by the [*1009 act for abolishing slavery, we were reminded that nothing appears in the declaration as to the place where this contract is to be carried into effect; that it might, therefore, contemplate the qualified servitude of apprenticed labourers in this country, where it was said to be altogether unlawful; but, further, that, if we must take notice of the slavery abolition act, and hold that the apprenticed labourers were lawfully such through its beneficent operation, still that class were placed under the immediate protection of the colonial legislature, and all their rights were to be regulated by orders to be enacted respecting them. Hence it was argued that no agreement for their services could be valid and binding till such regulations made; and none are averred to have been made.

But we think that the objection first urged is none in point of law, and

that, on the contrary, it may form an answer to the second. The agreement here set out is for assigning such right and interest as the plaintiff had in the service and labour of certain apprentices. We do not know the terms of that apprenticeship; whether it was between the plaintiff and his assigns on the one part, and the apprentices on the other; whether any provision was made for assigning them with their own consent, and that consent given. There is nothing on the face of the declaration to invalidate the agreement if supposed to relate to inhabitants of England. Since, then, the contract may be intended to be carried into effect in this country, it is free from objection.

*1010] It is, however, proper to add that, assuming the *objects of it to have been formerly slaves, and to have become apprenticed labourers under the abolition act, and the agreement intended to be enforced in some of the colonies, we do not think it illegal for want of averring regulations to have been made by the colonial legislature. "According to such rules," &c. imports no more than that any contract relating to the service and labour of apprentices may be controlled by such regulations. If none are made, the contract must bind the rights of the parties till the superior power interfere with its provisions. Judgment for plaintiff.

The issues of fact were tried before Lord DENMAN, C. J., at the London sittings after Hilary term, 1843; and a verdict was taken by consent for the plaintiff on the 1st and 4th issues, and for the defendant on the 2d; the jury being discharged from giving any verdict on the 5th; subject to the opinion of this court upon the following case.

On the 22d of July, 1834, an ordinance was duly made and published as in the 2d plea mentioned: and it is agreed that either party may refer to the terms of this ordinance.

A book had been duly kept, for the purpose mentioned in the 2d plea, in the colonial registrar's office for the district and county of Berbice, immediately after the making and publishing the said ordinance, and before and at and after the time of the making and publishing of the said ordinance, and before and at and after the time of the making of the said instrument or agreement for the sale of the apprenticed labourers; and it was admitted *1011] at the trial, that the verdict must be *for the defendant upon the issue joined upon the replication to the second plea.

On the 12th of July, 1838, an ordinance was duly made and published by the governor of British Guiana as in the 4th plea mentioned. It is agreed that either party shall be at liberty to refer to the terms of this ordinance. It is also agreed that the pleadings are to be part of the case.

The questions for the opinion of the court are:—

1. Whether upon the above facts the verdict ought to have been for the plaintiff or the defendant upon the issue joined upon the replication to the 1st and 4th pleas respectively.

2. Whether the plaintiff is entitled to judgment non obstante verdicto upon the issue joined upon the replication to the 2d plea.

The defendant is to be entitled to arrest the judgment upon the verdict upon the issue joined upon the replication to the 4th plea, if the court should be of opinion that the defendant would have been entitled to arrest the judgment upon motion.

If, in the opinion of the court, the plaintiff is entitled to recover upon the whole record, the verdict is to be entered for 2600*l.*, with interest at 6*l.* per cent. until payment.

The verdict and judgment are to be entered in accordance with the opinion of the court.

The special case was argued in Easter term, (April 30th,) 1844.

Martin for the plaintiff. First, the respective rights of the parties accrued on the making of the agreement; and that agreement was not revoked by any thing which *was done afterwards. The consideration on one [*1012 part was a present sale and transfer; on the other, payment of an entire sum of money. The arrangement for paying by instalments made no difference in the nature of the contract; the purchase money was debitum in præsentī solvendum in futuro. There was a valid sale, under stat. 3 & 4 W. 4, c. 73, s. 10, when the agreement was entered into. The plaintiff guarantied possession of the services, but only so far as was in his power according to law. The proviso as to reverter was for the benefit of the vendor, and had reference to a state of things which never occurred. Secondly, the ordinance recited in the second plea enacted that no instrument for transferring the services of apprenticed labourers should be "good or valid in law to pass or convey or affect the services of any such apprenticed labourer or labourers, unless an annotation or memorandum of such deed or instrument should be made or recorded in a book to be kept for that purpose in the colonial registrar's office of each of the respective districts in the said colony within one month after the making or executing such deed or instrument, if made or executed in the said colony." But that does not make it the duty of the vendor to enter such annotation. The instrument of transfer would be with the vendee; and, therefore, it would rather be his duty to make the entry; and, if so, then, according to *Malins v. Freeman*, 4 New Ca. 395, and other cases on the same subject, he cannot allege his own default. Under the acts for registration of deeds in York and Middlesex, it would be no answer to an action by vendor against vendee for purchase money, that the *vendor did not cause the deed to be registered. This ordinance must be taken to assume [*1013 the same principle. It does not direct that the vendor shall register, and cannot have contemplated that, in default of registration, he should lose his purchase money. The words "valid in law to pass or convey or affect the services" must mean valid as between the purchaser and the labourers. The plea is, at any rate, defective in substance, because it does not show an obligation on the vendor to register. And, whatever effect be given to the ordinance as between the vendor and purchaser, the agreement was valid for a month, the sale, therefore, cannot be treated as null. Any

principle on which this plea could be upheld would entitle the defendant to recover back the first four instalments. Thirdly, the ordinance mentioned in the fourth plea was subsequent to the sale, and could not affect it if, as has been already contended, the sale was an absolute one on September 25th, 1834. The case is the same as if any one sold a property to-day, and an act passed to-morrow for destroying it: the vendee must sustain the loss. [PATTESON, J. If the contract had been for the payment of 7800*l.* outright, and the vendee had paid it, could he have recovered it back when the ordinance passed? He seems to treat the instalments as a kind of rent.]

Erle, contrà. As to the second point: a contract made abroad, and void there by the *lex loci*, cannot be enforced here; *Trimbey v. Vignier*, 1 New Ca. 151; *Rothschild v. Currie*, 1 Q. B. 43. By the ordinance which became the law of Berbice in March, 1834, the agreement here declared

*1014] *upon was void for want of a proper memorandum. The duty of making that entry is no more imposed on the vendor than on the vendee: it is required for the sake of the public. The principle that a man shall not take advantage of his own default is inapplicable: there is no default as between the plaintiff and defendant: but the party who seeks to enforce a legal right has to comply with the regulation imposed on behalf of the public. So, in cases under the Statute of Frauds, where a written instrument is necessary to a contract, the party who brings the contract into court must provide himself with the writing. In the instance referred to, of registration in York and Middlesex, the duty falls upon the vendee: but there the act to be done is peculiarly for his security as against subsequent purchasers; for, if no such purchaser claimed, the transfer would remain undisturbed though the deed was not registered. As to the presumption suggested here that the instrument would be in the vendee's hands: there is as much reason to suppose that the vendor would hold it, as long as any instalments remained payable. If they were not a rent, they were an annual payment which made it essential for the vendor to possess the written agreement. [WIGHTMAN, J. You treat the plaintiff's right as one accruing from year to year. Suppose all the labourers had died at the end of the first year; do you say that the residue of the 7800*l.* would never have been due?] At any rate, while things remained as contemplated in the agreement, there was a continuing right in the plaintiff which made it essential that he should hold the deed. The transfer, when agreed upon, was to become permanently valid or else void, as something was or was not done at the end of a month: the month having elapsed, and the act not being done according to *the ordinance, there was no transfer, and no right to *1015] payment. As to any actual enjoyment of the services, it is sufficient to say that the plaintiff has in fact received compensation for it.

The questions on the first and fourth pleas are nearly alike. A party cannot claim indemnity for consequences resulting from acts of the state to which he belongs; the law regards them as if done by himself; *Conway v. Gray*, 10 East, 536, judgment of the court, (p. 545.) Here, by the nature

and terms of the contract, the defendant was liable to pay hire for the services of apprenticed labourers during six years. The transaction on his part has been represented in argument as a contract for chattels sold; but it is for services to be performed during a term, and with a power continuing in the vendor to resume them in default of payment. The supposed analogy, therefore, to the case of a property sold and a law afterwards passed to destroy it, rests on an assumption which cannot be admitted [PATTESON, J. The clause of resumption certainly says that, in default of payment, the services shall revert, and the vendee remain liable for the value or hire of the labour¹¹ during the period for which he shall have received the services, "at and after the rate of 1300*l.* sterling per annum." That shows that the contract was for hire. The ordinance of July, 1838, evidently takes the same view of contracts under stat. 3 & 4 W. 4, c. 73, s. 10, when it directs that the apprenticed labourers shall be "discharged of and from the then remaining term of their apprenticeship," "and of and from all and every the obligations imposed on them by the said act." Sect. 10 *contemplates a transfer of services, but not a sale of the labourers: such [*1016 a contract is against the principles of the law of England; and if it be justified by the law of another country, that law must be expressly shown: *Smith v. Brown*, 2 Salk. 666.(a) This case, therefore, falls within the principle laid down in *Touteng v. Hubbard*, 3 B. & P. 291, 301: "If a party contract to do any thing, he shall be bound to the performance of his contract, if from the nature of that contract it is capable of being performed, and legally may be performed. But where the policy of the state intervenes and prevents the performance of the contract, the party will be excused; and so if a party who has covenanted not to do something is directed by act of parliament to do that very thing, he is released from his covenant." The ordinance of 1838 supports the allegation of mutual assent in the first plea.

Martin, in reply. The contract, by its terms, was in the nature of an assignment, not a lease. And this construction works no injustice. If the labourers had all died within a year, the vendor would still have been entitled to keep the purchase money: but if the colonial legislature had extended the term of apprenticeship for several years, the vendee would have had that benefit without further payment. Even if the instalments were a rent, the general rule is that, when the subject matter of a demise becomes extinct by means not within the control of either party, the rent goes on. The authorities on this subject are collected in *Hart v. Windsor*, 12 M. & W. 68. It is true that non-performance of a contract *is excused if the law prohibits the act; but even then, a contract partly per- [*1017 formed is not rescinded as to what has been done. As to the first plea: the ordinance of a government under which parties live does not bear out the allegation of an express consent. As to the second plea: the want of annotation did not render this contract void by the law of Berberie: it was,

(a) And see *Smith v. Gould*, 2 Salk. 666. S. C. 2 Ld. Ray. 1374.

indeed, not valid for the purpose of enforcing the services if the entry were not made within a month; but the property in the services passed by it, as the property in land passes by a deed, in York or Middlesex, before registration. The cases under the statute of frauds bear no analogy to that in which an instrument becomes invalidated if something be not done within a month. If the defendant here asserts that the transaction is like a sale with warranty of title, the answer is, that "the seller of goods is not responsible to the purchaser, if the latter be afterwards disturbed in the possession by a third person," "except in the following cases: first, if there be an express warranty; or, secondly, if there be a fraudulent misrepresentation or concealment by the vendor upon the subject:" Chitty on Contracts, p. 447, chap. 3, sect. 2, (3d ed.)

Lord DENMAN, C. J. The natural order, in considering this case, is to look first at the first and fourth pleas. It appears to me that the contract was an absolute sale of such right as the plaintiff had at the time, and that it was not affected by that which took place afterwards. There is nothing in the agreement importing that the plaintiff is to continue the defendant's right to the end of the term mentioned. My brother WIGHTMAN
 *1018] asked what would have been the result, if, at the end of a year, the services had been determined by the act of God; and to this no sufficient answer was given. Then as to the second plea. I think that the agreement did not become absolutely void by the omission to register. It was a good contract when entered into, and might have been made good for ever. The duty of taking the proper step for that purpose lay on the purchaser. After the lapse of a month the agreement became void with reference to the passing and conveying of services, but not, as between the plaintiff and defendant, with reference to the duty of paying the consideration money. The defendant cannot take that advantage of his own omission. The plaintiff has done all that lay in him; and the agreement itself is not affected: the only effect of the ordinance is upon the transfer of the services. The plaintiff's right vested when the bargain was made: the subsequent interference of the colonial legislature does not prevent his recovering what was then stipulated for: and it does not lie in the defendant's mouth to allege that such a consequence resulted from his own default.

PATTESON, J. With respect to the nature of this contract, I was at first caught by the argument of Mr. *Erle*, from the terms of the agreement, that it was intended as a contract of hiring and letting. But, on looking farther, I am of opinion that this was not a letting, but an actual assignment, of the services. The instrument declares that the plaintiff and his partner "thereby sell, assign, transfer, and make over all their right, title, and interest in and to the services" for and during the term of the apprenticeship. And the transaction, throughout the fourth plea, is treated as a sale; *not
 *1019] only is that word used, but it is distinctly averred that "the said written sale and agreement" "was made for the purpose," not of letting, but "of transferring the services of divers, to wit one hundred and fifty-

three, apprenticed labourers, and purported to transfer and assign" their services, "during the term of their apprenticeship." If they had died during the six years, the death would clearly have afforded no answer to a claim of the whole 7800*l*. I think, therefore, that this was a contract of sale; an engagement on one side to transfer all right to the services, and on the other to pay the stipulated sum. The defendant bound himself, at all events, to pay the whole by the expiration of the time allowed; and the act of the colonial legislature in 1838 made no alteration in that contract. The verdict, then, was right on the issue on the replication to the fourth plea: and the first issue raised the question only of an actual consent, not of an agreement implied by law; therefore the verdict on that also is right. As to the second issue; the plea does not show whose duty it was to make the annotation, but only that none was made. It was the duty of the defendant, as the purchaser, to make it; he was in possession of the deed. There might be two parts; but he at all events would have it. He, and not the plaintiff, was the proper person to do what was requisite to make the title sure. The plea is insufficient on this ground, and because it does not show that the duty lay on the plaintiff. The object of this ordinance was, not so much to make the contract good between the parties, as to let other persons know of its existence: the case, therefore, comes within the doctrine of the County registration acts, under which it has often been held that the want of registration does not affect a conveyance as between the purchaser and vendor, but the purchaser registers for his own protection against other parties. [*1020]

WILLIAMS, J. It seems to me that the contract to pay by instalments made no difference, but that this was an absolute contract in the first instance. It has been argued, as to the second plea, that, although the agreement was valid at the time of making, it was invalidated by the ordinance of March, 1834, if something was not done within a given time. But by whom? Nothing is shown which of necessity imposed that obligation on the vendor. It was the business of the transferee to make the contract available to himself by complying with the regulation. As to the fourth plea, the whole question is, who shall bear the loss occasioned by a *vis major*. And that depends much upon the question who was the proprietor when that loss was occasioned. The property in the services of these labourers had been transferred to the defendant. Then the question is analogous to those which often arise in cases of loss by fire; as, whether the goods destroyed were in transitu or the transit was ended. If the property here had passed, and the residue of it was destroyed by a *vis major*, the loss must fall upon the proprietor of the thing, namely, of the services during the unexpired term. And in my opinion that was the case.

WIGHTMAN, J. The question turns entirely, or almost so, on the effect of the contract. If it was an assignment of all the services for a gross sum of money, the plaintiff is entitled to recover all that remains due: but the defendant argues that the sum agreed for was in the nature of a rent, and

*1021] therefore the plaintiff is not *so entitled. Were it not for the : cause of resumption at the end of the agreement, this question could hardly arise. But it seems to me that that is a clause which the vendor alone could take advantage of, and which does not control the agreement, or make it any thing less than a sale for the entire sum. Then the second plea appears to me to afford no answer. The local law made the contract, in default of registration, invalid only for the purpose of conveying the services of the labourers. If the question were whether that duty was incumbent on the vendor or the vendee, one would suppose that it lay upon the party most interested. Had the whole money been actually paid down, it would be quite clear that the vendee was that party. The analogy between this case and those under the Register acts is strong; and in those Mr. Erle admits that the duty of taking care to secure the title rests with the vendee. I think, therefore, that in the present case it was the defendant's business to enter the memorandum. As to the fourth plea, it appears to me that the ordinance could not affect the plaintiff's right. He had done all that he professed to do, in consideration of a sum of money; and it makes no difference in principle, whether a sum in gross is to be paid in a short period, or to be paid by instalments during several years. With respect to the first plea, I think there is no pretence for saying that the defendant should have a verdict. "Consent," there, cannot mean the implied assent to the passing of a statute, but must signify an actual assent; and of that no evidence appears. Judgment for plaintiff.(a)

(a) See the next case.

*1022] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

FULLARTON v. MITTELHOLZER.

See the marginal note, p. 989, ante.

JUDGMENT being entered up in the preceding case for the plaintiff below, on the verdict upon the first and fourth issues, and non obstante veredicto on the second issue, and on demurrer to the third plea, the defendant brought error in the Exchequer Chamber, and assigned, as special grounds, that the declaration was insufficient in law; that the third plea was sufficient in law; that the second plea was sufficient in law, and that judgment, non obstante veredicto, ought not to have been given on the issue upon the replication to that plea; and that judgment upon the verdict on the fourth issue ought to have been arrested. The plaintiff below joined in error.

The writ of error was argued in this vacation.(b)

(b) February 4th. Before Tindal, C. J., Maule and Cresswell, Js., Parke, Alderson, Rolfe, and Platt, Bc.

Jervis, for the plaintiff in error, (defendant below.) First, on the present declaration, the contract must be taken to have been made in this country; and it is a contract for sale of the services of apprenticed labourers, contrary to the law of England. In England, "an assignment" of an apprentice, "however formal, is good by way of covenant, but not as an assignment to pass the master's interest, without a local custom to support it, and the defect is not cured by the apprentice's consent, because the person of a man is not strictly and legally assignable :"
 1 Nol. P. L. 567, 4th ed. The mere description of the apprenticed labourers, as "formerly slaves," does not imply such a state of things as would make this contract lawful. Nor can the court collect from the declaration that the parties made their agreement in Berbice. The pleas will not aid; for, on the present objection, the declaration stands as if it had been generally demurred to. Again, if stat. 3 & 4 W. 4, c. 73, is relied upon, the count should have alleged compliance with the provisions of sect. 10. [PARKE, B. We are not to intend a contract illegal if, as stated, it can be legal.] A contract cannot be presumed to have been made out of England unless the averments show it. [*1023]

But, secondly, if the court will intend that which might make this contract legal in its origin, the second plea is an answer to the action. The court below held otherwise, on the grounds, first, that the ordinance as to registration affected the service only, and not the payment of consideration money; and, secondly, that the vendee was the person who ought to have entered the memorandum. [PARKE, B. The defendant, by his contract, engaged to pay at certain times: nothing remained to be done by the plaintiff to entitle him to payment.] The contract must be considered with reference to the local law; and that, being passed for the protection of the apprenticed labourers, will be construed strictly. The regulation, having that object, must be compulsory on some one, and ought to be so on the person seeking to enforce it. The ordinance itself gives no direction. *It may be admitted that, during the month allowed for registration, the property would pass; but it does not follow that any right would exist beyond the month, if no annotation were made. *Rex v. Spreyton*, 3 B. & Ad. 818, shows that the transfer, without the observances required by law, is, even now, ineffectual. Stat. 3 & 4 W. 4, c. 73, s. 10, creates a new statutory power; and the ordinance, being one of those referred to by the section, has the same force as the statute. A contract illegal by statute cannot be the ground of an action; and, where the legislature has declared that agreements contrary to a particular enactment shall be void, the courts will not hold them merely voidable, if the enactment be made "for public purposes, and to protect those who are incapable of protecting themselves;" *Rex v. Hipswell*, 8 B. & C. 466, 471, judgment of BAYLEY, J.: and the same principle, as to public policy, is recognised by Lord DENMAN, J. C., in *Pearse v. Morrice*, 2 A. & E. 84, 94. [TINDAL, C. J. How can it be presumed that the vendor can make this annotation? If there is a deed, [*1024]

he delivers it to the vendee.] The memorial of an annuity is enrolled by the grantee: but it is his peculiar interest to enforce it. A bargain and sale is enrolled by the party interested in giving it effect. [TINDAL, C. J. Here, the party who wants the service has the same interest. PARKE, B. The plaintiff has done all that, on the face of this contract, appears necessary; and there is an absolute contract by the defendant. You want to annex something to that.] In any case of a contract on illegal consideration, the plaintiff might say that he had done every thing required on his part. [PARKE, B. The contract here is not bad if noted in time. TINDAL, C. J.

And *it is not void to all purposes.] It is, at least, for that of *1025] passing the services. [TINDAL, C. J. It is the greater folly in the purchaser not to note. MAULE, J. A man may contract to pay for the option of noting or not. TINDAL, C. J. Here, under the contract, he might have had the services if he had thought proper. MAULE, J. It is like a contract to provide a dinner for a man if he chooses to eat it. ALDERSON, B. But that he is to lose it if he comes too late. TINDAL, C. J. The court has no doubt as to the second plea. It is as if a deed of bargain and sale contained a covenant for payment of purchase money at a future day, and the deed was not enrolled. The covenant to pay would still hold good.] There the party would have bound himself by deed. Here it is not so. [TINDAL, C. J. It is the same thing.]

Then, thirdly, the third plea showed sufficiently that the services of the labourers reverted, and so the defendant was released from his contract. [ALDERSON, B. It does not state that the plaintiff reclaimed.] If he acted as reclaiming, he cannot now say, "I took the labourers back wrongfully, and therefore you must still pay the instalments." [PARKE, B. You ought to show that the plaintiff acted under the power reserved by the agreement. You do not bring yourself within the clause.] 'Although the plaintiff acted wrongfully, the defendant may adopt his act, and say, "the services have reverted, and I am no longer bound to pay." But the facts admitted on the record show that, in effect, the plaintiff did exercise a right of reclaiming. [PARKE, B. It does not appear that an instalment was due and unpaid when he took back the labourers. Then his act was a mere trespass, for which you had a cross remedy. TINDAL, C. J. Your construction pushes the doctrine of waiving a tort to a very great extent.]

*Fourthly, after the ordinance recited in the fourth plea, no further *1026] instalment could be claimed.(a) PARKE, B. The contract on your part was the same as if the money had been payable at once. ALDERSON, B. You took your chance of what might happen afterwards.] The plaintiff's contract amounted to a guarantee for six years. [MAULE, J. If it was a guarantee, and was broken, still you could only have a cross action.] The agreement is the same in effect as if it had been to pay at so much a day.

(a) It appears to have been assumed in argument that the record raised, on the issue upon the replication to this plea, the question as to the legal effect of the ordinance. No discussion, however, took place on this point.

[TINDAL, C. J. There it would have been expressly dependent upon the time during which the services were had.] Here it is so in effect. If the plaintiff reclaimed the services before the specified term expired, the defendant was to pay only in proportion to the time of actual service. [PARKE, B. That was if the plaintiff availed himself of an option reserved to him in a distinct part of the contract. ALDERSON, B. But he has not done so.] If the court think that the case stands as if the defendant below had agreed to pay 7800*l.* at first, the argument for the defendant cannot be pressed farther.

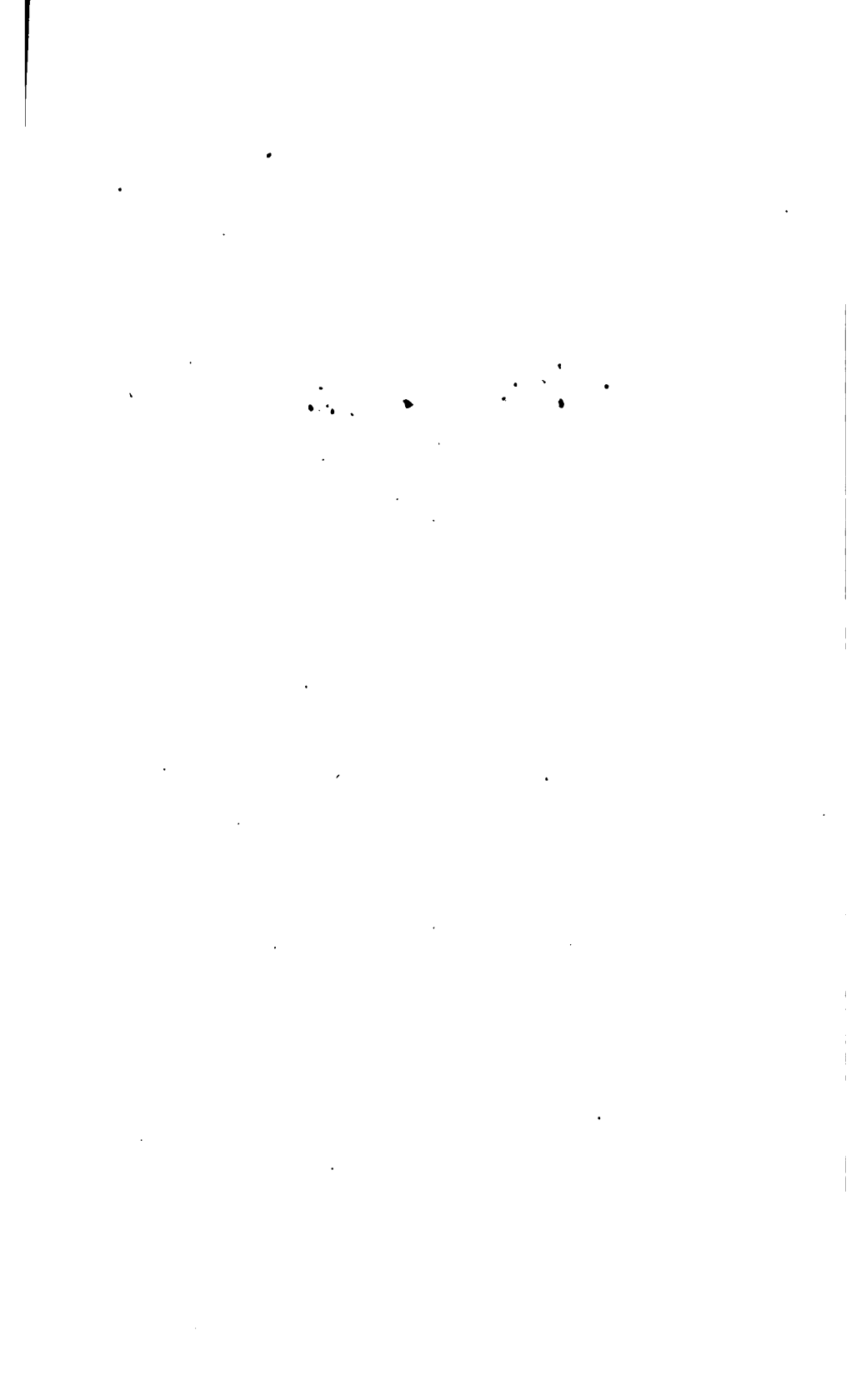
Martin, contra, was not heard.

Per Curiam.

Judgment affirmed.

Wilkinson v. Lloyd, decided in this Vacation, (March 1st,) will be reported in the next volume.

END OF HILARY VACATION.



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Held, a fatal objection that the words "before me" were not inserted between the date and the signature, though an exhibit was annexed, having subscribed to it the words, "This is the notice referred to in the annexed affidavit of C. E., sworn before me this 8th day of February, 1844. Wm. Munton." *Regina v. Blaxham*, 528.

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The judge at the trial ordered the declaration and plea to be amended under stat. 3 & 4 W. 4, c. 42, s. 23, by stating in the count that, in consideration that plaintiff would *procure the British and Australasian Bank, in which plaintiff was a partner*, to make advances, &c., to B., defendant promised plaintiff to repay *the said bank* such sums as plaintiff should so *cause to be advanced*, &c.: and, in the plea, that plaintiff did not *procure the said bank* to make the said advances.

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II. Hearing.

1. Taking evidence in absence of parties.

Where an arbitrator questions a witness, and receives statements from him in the absence, and without the consent, of one party to the reference, the court will set the award aside, without taking into consideration the nature of the statements, or the probability of their having influenced the decision.

G. indicted D. for a nuisance committed by erecting a fixed pier in the bed of the Thames. D. brought an action against G. for disturbing his right of waterway near the same place, by placing barges, &c., which formed a floating pier. Both cases were referred to an arbitrator. After hearing and dismissing the parties, the arbitrator sent for a deputy water-bailiff, who had been examined on the reference, and questioned him as to the means of giving convenient access to the shore, supposing the fixed pier to be removed. Neither party to the reference appeared at or had notice of the meeting; a special pleader, who had been employed on the reference as advocate, was present, but not professionally. The party who afterwards complained of this proceeding had notice of it four days before the arbitrator made his award, but did not remonstrate.

By his award on the indictment, the arbitrator directed a verdict of guilty to be entered, and the fixed pier removed; by his award in the action he ordered a verdict to be entered for the defendants on the issue upon Not guilty, and on certain other issues, and for the plaintiffs on the residue, and directed that, when the fixed pier should have been removed as ordered by the other award, the defendants should place their barges according to certain specified regulations.

Held that, by reason of the irregularity, no part of the award in either case could stand.

And, on motion to set the awards aside, that the omission to remonstrate after knowledge of the irregularity, and before the making of the awards, was no answer.
Dobson v. Groves, 637.

2. Taking evidence separately and in absence of parties.

Unprofessional arbitrators appointed by an agreement of reference, ascertained, at a meeting, the balance due from A., one of the litigant parties, to B., the other, except a few pounds, which the arbitrators proposed to make payable by A. to B., on account of interest owing by A. to a third person, R., on a mortgage of land, the property of A., which A. was to assign to B. By arrangement between themselves, the arbitrators, without holding any further meeting, questioned R. separately, and in the absence of the parties, as to the amount of interest due; each then stated the result of his inquiry to the other, and, the reports agreeing, they made their award.

The court set the award aside on motion, as procured by "undue means," contrary to stat. 9 & 10 W. 3, c. 16, s. 2, the course pursued having been inconsistent with natural justice.

An agreement of reference contained a clause for making such agreement a rule of court. The award being published, and a motion about to be made for setting it aside, the party interested in opposing such motion refused to produce the agreement for the purpose of its being made a rule. The court, on motion in the next term after the making of the award, permitted a copy of the agreement to be made a rule of court, and granted thereupon a rule nisi for setting the award aside. *Plews and Middleton, In re*, 845.

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IV. Remitting for reconsideration.

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Where an order of reference has a clause empowering the court, if the award be disputed, to remit the matters for the reconsideration of the arbitrator, and the case is so remitted, the arbitrator must hear fresh evidence, if tendered, as on the original reference.

Quære, whether, under such a clause, the court may remit the case for reconsideration a second time.

But, where the case had been once so remitted, and the arbitrator had declined to hear more evidence, but amended his award, deciding in favour of the same party as before, and, on motion to set aside such further award, the other party opposed a further reference to the same arbitrator, the court set the award aside. *Nicholls v. Warren*, 615.

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VI. Finality.

Reservation, under power, of points of law and evidence for the opinion of the court.

A verdict was taken at nisi prius for 3000*l.* damages, subject to the award of a barrister, to whom all matters in difference in the cause were referred, with power to decide on the admissibility of evidence as a judge at nisi prius might, and to reserve points of law for the decision of the court. And there was the usual power to proceed ex parte, if either of the parties should by affected delay prevent making the award, or should not attend after reasonable notice and without such excuse as the arbitrator should adjudge reasonable.

The arbitrator made a special statement of facts, affecting the admissibility of certain depositions in evidence, and awarded that the verdict should be reduced to 1358*l.* if the court should be of opinion that the depositions of A. and B. were admissible: to 1165*l.* if the court should think the depositions of A. only admissible; and to 579*l.* if the court should think neither of the depositions admissible. *Held*, that the award was final.

The arbitrator, having, in the course of the reference, (April 28th,) appointed a meeting for a certain day, (May 15th,) was informed by the defendant that he did not intend to be present, one of his reasons being, that, on account of the non-admissibility of certain depositions which the arbitrator had not rejected as evidence, no award he could make would be valid; and another reason being that the notice was too short. The arbitrator, (having postponed the meeting for a day, of which he gave defendant notice, but without reference to defendant's communication,) proceeded ex parte.

Held, that he was warranted in so doing, though he had not warned the defendant that if he absented himself the arbitration would proceed ex parte. *Scott v. Vansandau*, 237.

VII. Uncertainty.

1. In not finding the issues distinctly, 730. *Post*, 2.

2. In the manner of directing that things awarded shall be done.

An award in an action where several issues are joined, and the costs are to abide the event of the award, ought to contain a distinct finding on each issue. For want of such finding the award will be bad for uncertainty unless, (*semble* per Lord DENMAN, C. J.,) it be clear, on the face of the award, that the arbitrator has in effect found on every issue.

Where an action for polluting the water of a watercourse was referred to an arbitrator, with power to him to regulate the enjoyment of the water,

Held, that a award directing a verdict to be entered for plaintiff, and that defendant should at all times take *all proper and reasonable precautions* for preventing the water from being rendered unfit for plaintiff's use, *and, in particular*, should use a process of filtering mentioned in the award, was bad for uncertainty.

The direction as to the particular process was, that the water passing from defendant's to plaintiff's premises should be passed through filtering lodges made or to be made by defendant, so as to be thereby purified and cleansed for plaintiff's use, "so far as the same can be purified and cleansed by the ordinary and most approved process of filtering as aforesaid."

Held, that the description by reference only to the "ordinary and most approved process" was uncertain, and the award bad in this respect also. *Stonehever v. Farrar*, 730.

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And, where judgment n. debt was signed for want of a plea: *Held*, that the time ran from such signing, although the costs were not taxed. *Walter v. De Richemont*, 544.

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 VI. His lien for costs.
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The mortgagee of lands handed over the deeds to his attorney. The mortgagor paid the principal and interest, and the lands were re-conveyed to him.

Held, that the attorney could not retain the deeds against him, as a security for the expenses of the transaction due from the mortgagee to the attorney:

And that the mortgagor, having, under protest, paid such expenses to the attorney in order to get the deeds back, might maintain assumpsit for money had and received against the attorney for the money so paid:

And that the attorney was a principal in the transaction, and could not allege that the action should have been brought against the mortgagee. *Wakefield v. Newbon*, 276.

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III. Time at which a trader becomes bankrupt.

Under stat. 6 G. 4, c. 16, s. 72, which empowers the commissioners in bankruptcy to dispose of goods being in the possession, order or disposition of the bankrupt as reputed owner "at the time he becomes bankrupt," the time meant is that of committing the act of bankruptcy, not the time when the fiat issued: stat. 2 & 3 Vict. c. 29, s. 1, making no alteration in this respect.

A trader assigned his effects to a trustee, thereby committing an act of bankruptcy. Afterwards a creditor, ignorant of the act of bankruptcy, took in execution the trader's goods comprised in the assignment. The trustee paid off the execution, and took an assignment of the goods from the sheriff.

A fiat in bankruptcy having afterwards issued against the trader,

Held, that, although the levy made by the execution creditor might have been protected by stat. 6 G. 4, c. 16, s. 81, or 2 & 3 Vict. c. 29, the party who had become assignee of the sheriff with knowledge of the act of bankruptcy, could not avail himself of that protection, and that the assignees in the bankruptcy might bring trover against him for the goods. *Fawcett v. Fearn*, 20.

IV. Petitioning creditor.

Forfeiture of his debt by receiving money from bankrupt, 414. Post, V. 1.

V. Payments to petitioning creditor after docket struck.

1. Forfeiture of the debt.

Defendant, being a creditor of C., struck a docket against him, and issued a fiat, but did not file it, (under stat. 2 & 3 W. 4, c. 114, s. 5,) nor otherwise proceed in the bankruptcy. Afterwards he was requested by C. to sign a composition deed, together with C.'s other creditors, accepting 10s. in the pound. He refused to do this, except on receiving security for his whole debt; which C. gave him by promissory notes; and defendant thereupon signed the deed.

C. afterwards committed an act of bankruptcy; and a fiat was prosecuted, under which plaintiffs were assignees. Before this act of bankruptcy defendant received money on one of the notes which had fallen due. Plaintiffs brought money had and received for the amount.

Held, that they could not recover, for that, although the case was within stat. 6 G. 4, c. 16, s. 8, and defendant's debt was forfeited, the money was to be paid only to persons appointed by commissioners under some commission founded on the defendant's docket, or under some later commission, and no appointment for this purpose had been made; and that, as C. himself could not recover the money, being a party to the transaction, the plaintiffs, who succeeded only to C.'s rights, could not. *Belcher v. Sambourne*, 414.

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Under stat. 6 G. 4, c. 16, s. 90, a defendant, who is assignee of a bankrupt, may prove the act of bankruptcy at nisi prius by merely putting in the proceedings, if the opposite party has given no notice to prove the petitioning creditor's debt, &c., and if it be clear that such opposite party must have known that the bankruptcy would be relied on by defendant, though defendant is not named assignee on the record. *Fawcett v. Fearn*, 25 n.

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1. Examination under interim order: right to remand.

When a debtor who has been taken in execution comes before a commissioner in bankruptcy to be examined after an interim order for protection under stat. 7 & 8 Vict. c. 96, the commissioner has power to remand; and that authority is incident to his power of adjudicating on the petition, and is not limited to the cases enumerated in sect. 24.

Quare, whether the benefit of stat. 7 & 8 Vict. c. 96, can be taken by a party whose effects are already vested in the provisional assignee of the Insolvent Debtors' Court under stat. 5 & 6 Vict. c. 116.

But, the commissioner having, on petition under stat. 7 & 8 Vict. c. 96, decided that the benefit of the act could not be so taken, and having therefore remanded the prisoner:

Held, (on habeas corpus and return of the commissioner's order showing the facts,) that this court could not review his decision. *Partington, Ex parte*, 649.

2. Right to apply after vesting of effects under stat. 5 & 6 Vict. c. 116, 649. *Ante*, 1.

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BARON AND FEME.

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II. Wife: her acts.

Surrender by attorney: revocation by death.

In the manor of L., in Cumberland, the custom of tenure, (called tenant-right,) is that the freehold is in the lord, and the tenant holds of the lord, to him and his heirs for ever, according to the custom of the manor, at fixed rents and services. A fine is paid on every admittance. On alienation, a deed of bargain and sale is executed by the alienor to the alienee, which the alienor brings into court, whereupon the steward, by proclamation, calls upon any one to come forward who can say why the alienor shall not surrender into the hands of the lord; he then says to the alienor, "you surrender into the hands of the lord, to the use of the alienee, his heirs and assigns; are you content to make this surrender?" On the alienor assenting, the steward, by proclamation, calls on any one to come forward who can say why the alienee should not be admitted tenant. Then the steward says to the

alienee, "In the name of the lord I admit you tenant, to hold to you, and your heirs and assigns, according to the custom." The jury then present the alienee as tenant on the alienation of the alienor, to hold to him, his heirs and assigns, according to the custom: the bargain and sale recites a license from the lord to alien, which, after the admittance is endorsed on the deed of bargain and sale; the license is a matter of course, and a fixed sum is paid for it. When a married woman conveys, she and her husband execute the bargain and sale in court; the wife is then separately examined, and, after that, the proceedings go on as before stated: or the husband and wife may, out of court, execute the bargain and sale, and surrender, before the lord, his steward or deputy, who examines the wife separately. Surrenders out of court may be made by or to the parties themselves, or their attorneys: the surrender may be made to the lord himself, or his steward or deputy. In all cases the surrender is stated to be made to the lord: and the admittance afterwards may take place either in or out of court. The surrender and admittance are in all cases entered on the rolls.

A married woman, who before her marriage had been admitted as tenant, executed, jointly with her husband, out of court, a bargain and sale, being previously examined by the deputy steward. By the deed, the husband and wife "granted, bargained, sold, aliened, surrendered, set over and confirmed" (with the lord's license) to the alienee, according to custom; then followed a clause, by which the husband and wife "do, and each of them doth, hereby severally and respectively ordain, constitute and appoint" J. "their and each of their several and respective attorney, for them, and in each or either of their several names," at the next or other court, to surrender into the hands of the lord according to the custom.

At a court, holden after the wife's death but in the life of the husband, J. surrendered to the lord; and the alienee was admitted. The entry was, that the husband and wife, by J., surrendered to the lord to the use of the alienee.

On a case stating the above facts, *Held*, 1. That the surrender to the lord was an essential part of the alienation; and that the bargain and sale, without such surrender, did not pass the estate.

Per Lord DENNAN, C. J. Especially as the case concluded by stating the question to be, whether the deed of bargain and sale, and the surrender and admittance, were sufficient, complete and valid, as against the heir.

2. That J., as attorney for the husband, had no power to surrender.

3. That assuming J. to be lawfully constituted attorney for the wife, (and, per *PATRICKSON, J.*, *semble*, he was not,) the power expired by her death, and the surrender was therefore void. *Graham v. Jackson*, 811.

III. Wife: her property.

1. Effect of her death as to her customary freeholds, 811. *Antè*, III.

2. Promissory note of which she is payee.

A feme sole, payee of a promissory note payable with interest, married, and her husband survived her. *Held*, in an action on the note by her administrator,

(1.) That the note did not become the property of the husband, but passed to her administrator, though the husband had received the interest during her life; for that he did not thereby reduce the chose in action into possession.

(2.) That the payment of such interest, in the wife's life, to the husband, within six years before action brought, must be considered as made to him in the character of agent to the wife, and was an answer to a plea of the statute of limitations.

(3.) That, under stat. 6 & 7 Vict. c. 85, s. 1, the husband was a competent witness in such action to prove the payment of interest. *Hart v. Stephens*, 937.

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In an action against husband and wife, the wife, being taken in execution, applied to the court to be discharged, on affidavit stating that she lived separate from her husband, had for several years been boarded, lodged and clothed at the expense of her son, was not possessed of or entitled to any property in possession, remainder or reversion, and had no means of satisfying, or expectation of being able to satisfy, the damages or costs.

Affidavit was made in answer, suggesting generally, on information and belief, that the wife had separate funds, and stating that the son, in consideration of his father's giving up to him a certain business, had covenanted to maintain his mother during her life, provided she would reside with him and assist him in such business; and that the wife, when arrested, was residing with the son and assisting him in the business.

Held, that under these circumstances, it lay on the wife to show that no property

was held by the son to her use; and, this not being done, the court refused to discharge her from custody. *Ferguson v. Clayworth*, 269.

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John Hart drew a bill payable to himself or order, addressed to John Hart; C. wrote across this, "accepted, H. J. C." *Held*, that C. could not be sued as acceptor of a bill of exchange directed to him. *Davis v. Clarke*, 16.

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Prosecution for non-repair: costs: time of certifying: enforcement in banc.

Stat. 13 G. 3 c. 78, s. 64, empowered the court trying an indictment for non-repair of a highway to award costs if the defence was frivolous. Stat. 43 G. 3, c. 59, s. 1, enacts that all "matters and things in the said act contained, relating to highways," shall, so far as applicable, be extended and applied to county bridges "as fully and effectually as if the same and every part thereof were herein repeated and re-enacted."

Held, that the clause as to costs in stat. 13 G. 3, c. 78, was substantively re-enacted in stat. 43 G. 3, c. 59, with reference to county bridges, and therefore was not repealed when stat. 5 & 6 W. 4, c. 50, repealed, in general terms, stat. 15 G. 3, c. 78.

The judge who tries an indictment for non-repair of a bridge, removed by certiorari, may certify after the assizes that the defence was frivolous, and by such certificate award payment of costs to the prosecutor, which will be enforced by the court in banc. *Regina v. Merionethshire, Inhabitants*, 343.

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Where an indictment has been removed by certiorari and a conviction obtained, the person who, being a party grieved, retained and is liable to the attorney for the prosecution is entitled, under stat. 5 & 6 W. & M. c. 11, s. 3, to the costs of such prosecution, though other aggrieved parties, after the attorney was retained and the indictment removed, agreed to contribute part of the costs, and they are not joined in the application. *Regina v. Williams*, 273.

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1. Form of warrant, 759. **Post. 2.**

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By a railway act (7 W. 4, & 1 Vict. c. xxii.) it was enacted that, for settling differences between the company and owners of land, the company should issue a warrant commanding the sheriff to impanel, &c., a jury, which jury should "inquire of, assess, and give a verdict for the sum of money to be paid," "by way of satisfaction or compensation," "for the damages" sustained from the company's acts. It was also provided that no proceedings had in pursuance of the act should be quashed or vacated for want of form, or removed by certiorari. The company issued their warrant to the sheriff, commanding him to impanel a jury "for the purpose of inquiring of, assessing, and giving a verdict for, the sum of money (if any) to be paid" to C. "by way of satisfaction or compensation" "for the damages (if any) which shall have been done." &c. The jury, on the inquiry in pursuance of this warrant, found that C. "had not sustained any damage;" "therefore it was considered that no damages or sum of money be assessed," &c. *Held:*

(1.) That the jury, even though the words "if any" had not been in the warrant, would still have been authorized to find that there was no damage. And, consequently,

(2.) That the words in the warrant did not vary the duty imposed upon the jury, or prevent the warrant from being in pursuance of the act. Therefore,

(3.) That the proceedings were within the jurisdiction conferred by the act, and so

certiorari lay. *Regina v. Lancaster and Preston Railway Company*, 759.

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COMPROMISE.

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1. Compromise of a misdemeanor, when not legal.

The law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action; but, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

Therefore, although the party injured may lawfully compromise an indictment for a common assault, an agreement to pay the costs of a prosecution for assault on plaintiff and riot, and of an action for wrongful levy under a *fi. fa.*, which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution under the *fi. fa.*, is altogether invalid, as grounded on an illegal consideration.

Although the compromise of the prosecution was entered into with the leave of the judge before whom the indictment came on for trial. *Keir v. Leeman*, 308.

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I. What enters into the consideration.

1. Matters merely explanatory do not.

An agreement by plaintiff, (an attorney,) defendant and B. set forth that, "in consideration" of B. having agreed to pay to defendant his claim against B., and certain costs, out of the proceeds to arise from the recovery by B. in an action of B. against J., defendant undertook to pay plaintiff all costs incurred by him in prosecuting the action of B. against J., plaintiff thereby agreeing with defendant to bring the same.

Held, that, in assumption on this agreement, the consideration was rightly described to be that plaintiff, at the request of defendant, would, with B.'s assent, prosecute the action of B. against J. *Dally v. Pooly*, 494.

2. Collateral agreement with a third party, 494. *Anté*, 1.

II. Partly illegal, 308. *COMPROMISE*, I. 1.

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2. Statement of, when not amendable under stat. 3 & 4 W. 4, c. 42, s. 23, 362. *AMENDMENT*, II.

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I. Indictment and information.

1. General charge, when sufficient.

A count for conspiracy charged that T. and B. conspired to cause certain goods which had been and were imported and brought into the port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to the queen, to be carried

away from the port and delivered to the owners without payment of a great part of the duties, with intent thereby to defraud the queen; not further describing the goods or the means of effecting the objects of the conspiracy. *Held* sufficient, on motion in arrest of judgment.

T. did not appear: B. pleaded Not guilty. On his trial it was proved that T. was agent for the importer of the goods, B. a landing waiter at the custom house; that it was T.'s duty, (under stat. 3 & 4 W. 4, c. 52, s. 24,) to make an entry describing the quantity, &c., of the goods; that a copy of such entry was delivered to B., who was to compare this copy with the goods, and, if they corresponded, to write "correct" on T.'s entry; whereupon T. would receive the goods on payment of the duty according to his entry. It was further proved that T.'s entry was marked "correct" by B., and corresponded with B.'s copy; that payment was made according to the quantity there described, and that the goods were delivered to T. Evidence was then offered of an entry by T., in his day book, of the charge made by him on the importer, showing that T. charged as for duty paid on a larger quantity than appeared by the entry and copy before mentioned. *Held*, admissible evidence against B.

It was proved that B. received the proceeds of a check drawn by T. after the goods were passed. The counterfoil of this check was offered in evidence, on which an account was written by T., showing, as was suggested, that the check was drawn for half the aggregate proceeds of several transactions, one of which corresponded in amount with the difference between the duty paid and the duty really due on the above goods. *Held*, not evidence against B. *Regina v. Blake*, 126.

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3. "According to the course and practice of the said court," 773. *PLEADING*, VII. 1.
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5. "Issued out of the same court upon the said order," 773. *PLEADING*, VII. 1.
6. "Make and prosecute such application," 300. *NEW TRIAL*, IV.
7. "Of themselves discontinue," 115 *POOR*, VI. 2.
8. "G. R. one of the judges of the said court," 773. *PLEADING*, VII. 1.
9. "In the said county," 507. *POOR*, XVIII.
10. "The said Joseph apprentice" the preceding name being John, 549. *POOR*, XIII. 1.
11. "At the time he becomes bankrupt," 20. *BANKRUPT*, III.
12. "Toll," 31. *MARKET*, I. 1.
13. "Upon his farm, on the right hand side of" a certain carriage way, 323. *HIGHWAY*, V. 1.
14. "Trees, &c., other than such bushes and thorns as should be necessary for the repair of the fences," 323. *HIGHWAY*, V. 1.
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III. Seizure quousque on proclamation.

1. Heir's right to come in, how enforced.

The heir of copyhold lands not appearing on proclamation, the lord seized quousque. Afterwards the heir claimed; and the lord declining to admit him, on the supposition that another party had title, the heir obtained a rule nisi for a mandamus to admit. On discussion of the rule, it was ordered, by consent of the heir and lord, (no other party appearing,) that an ejectment should be brought to try the right, the heir being lessor of the plaintiff, and the lord defendant; and that the rule for a mandamus should be enlarged in the mean time: and the parties agreed to waive technical objections on the trial.

The heir proved title; and the defendant put in a will of the ancestor, devising the lands to the London Annuity Society. No further evidence being given for the defendant, the judge left the case to the jury on the proof of title in the lessor of the plaintiff; and the plaintiff had a verdict.

On motion to enter a nonsuit, cause being shown at the same time against the rule nisi for a mandamus:

Held, that plaintiff was entitled to recover, for that the lord, though he had seized quousque, could not hold against the heir on the mere proof of a devise to parties who had not claimed admittance, and of whom nothing was known. Rule for a nonsuit discharged. Rule for a mandamus made absolute. *Doe dem. Le Keux v. Harrison*, 631.

2. How the lord is to set up *jus tertii*, 631. *Antè*, 1.

3. Does not give the lord an adverse title, 631. *Antè*, 1.

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IV. Devise of.

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V. Leases of.

Contrary to custom, how far valid.

Tenant of copyhold demise to A. from year to year, and pending such demise, made a lease of the reversion for twelve years to B., contrary to the custom of the manor, by which no tenant might demise without license for more than three years. In ejectment by B. against the yearly tenant, whose term had expired, *Held*, that defendant could not allege the invalidity of the twelve years' lease.

For a lease made contrary to custom is good against all but the lord; and, even as against parties to the lease and the lord, the demise against custom is only a ground of forfeiture, which the lord may waive. *Doe dem. Robinson v. Bousfield*, 492.

VI. Forfeiture.

1. By breach of custom as to time of admittance: waiver by lord.

By the written customs of the manor of Hackney, (confirmed by stat. 21 Jac. 1, c. 6, private,) every person to whose use lands are surrendered "ought to come within three years" after the surrender is presented, and be admitted, (sect. 34.)

Held, that this custom was only for the benefit of the lord, who might waive it, and grant a valid admittance after the expiration of the three years.

Therefore, where P., copyholder of the manor, surrendered to the use of W., who was admitted more than three years after presentment of the surrender: *Held*, that W., after admittance, might maintain ejectment against P. and all claiming under her. *Doe dem. Ramsey v. Coombes*, 535.

2. By breach of custom; who may take advantage of, 492. *Antè*, V.

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In a declaration on a feigned issue, tried under stat. 6 & 7 W. 4, c. 71, s. 46, to review the decision of a tithe commissioner, there were three counts, in each of which the plaintiff denied, and the defendant asserted, the existence of a modus therein severally described; the three modusses being in respect of three independent tithable subjects. Verdict for plaintiff on one count, and for defendant on the two others.
The court allowed no general costs, but gave both parties the special costs of the issues on which they had respectively succeeded. *Mac Carthy v. Nepean*, 252.
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Covenant, on a deed executed between *plaintiff and H.* of the one part, and the defendant of the other part. The deed recited that defendant had applied to plaintiff to lend, on mortgage, 2900*l*, *moneys of H.*, then in plaintiff's hands as trustee for H.: that plaintiff had declined, not being satisfied with the security for payment of interest, whereupon defendant offered the after mentioned covenant as further security, and *plaintiff and H.* being satisfied therewith, agreed to accept the same, and advance the 2900*l*: that accordingly, by indenture of mortgage and assignment, to which E., the borrower, was party of one part, and plaintiff and H. respectively of other parts, in consideration of 2900*l*, paid by plaintiff to E. out of such moneys of H. as aforesaid, a policy of assurance and the dividends on certain bank annuities were assigned to plaintiff, but subject to redemption, &c., with covenants by E. to pay principal and interest and the premiums on the policy, and a proviso that, in default of payment of any such premium, plaintiff, might pay the same and repay himself the amount out of the bank annuities. After these recitals, defendant, by the first mentioned deed, in pursuance of the agreement, and in consideration of the premises, and of plaintiff having advanced the 2900*l* to E., covenanted, &c., with and to plaintiff, his executors, &c., and also as a distinct covenant with and to H., her executors, &c., that defendant, subject to the proviso after mentioned, would pay five per cent. interest on the 2900*l* until payment of the principal. Provided, and it was declared and agreed between and by the parties thereto, that the covenant was intended only as a security for so much of the interest as the dividends of the bank annuities, &c., after payment of the premiums, should be insufficient to pay: and that, as between defendant, and the plaintiff and H., their executors, &c., such part of the dividends as should from time to time remain after payment of the premiums should

first be applied in payment of the accruing interest, or so much as the dividends should be sufficient to pay, and that defendant, his heirs, executors, &c., should be liable on the covenant for so much only of the interest as the residue of the dividends should from time to time be sufficient to pay.

Held, that H. ought to have been joined as a plaintiff by reason of her joint interest, disclosed by the deed, in the subject matter of the covenant. *Hopkinson v. Lee*, 964.

2. Usual and accustomed, 208. *LEASE*, I. 1.

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1. To insure.

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IV. Effect of payment after action brought.

In an action for trespass in taking plaintiff's goods, the defendant, having pleaded only the general issue, cannot, even in mitigation of damages, give in evidence a repayment by him, after action brought, of money produced by the sale of the goods.

In trespass for taking plaintiff's goods, Not guilty being pleaded, and the plaintiff having proved that defendant, an attorney, delivered a *fi. fa.* to the sheriff, who thereupon took the goods, *quare*, whether defendant may give in evidence a judgment on which the *fi. fa.* issued. *Rundle v. Little*, 174.

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Revocation of power of attorney by, 811. *BARON AND FEME*, II.

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1. For which *capias* in execution will not be issued under stat. 7 & 8 Vict. c. 57.

Plaintiff, under stat. 3 & 4 W. 4, c. 15. s. 2, recovered 12*l.* against defendant in an action of debt, for six performances of a dramatic piece, of which plaintiff was the author, without plaintiff's consent; and the declaration averred that 40*s.* was the greatest damage sustained for each performance.

Held, that this was a debt recovered, within stat. 7 & 8 Vict. c. 96, s. 57, and that defendant could therefore not be taken upon a *ca. sa.* on such judgment. *Fitzball v. Brooke*, 873.

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- III. Title deeds: who entitled to hold.
1. Party interested in equity of redemption.
- By marriage settlement, lands were settled on the husband for life, with a joint power of appointment in the husband and wife. They mortgaged the land, with all title deeds, to A. for a term, and delivered the deeds to him. M. D. paid off the mortgage, and took an assignment of the premises from A., the

first mortgagee, but without mention of title deeds, and M. D. never demanded them. A. afterwards gave up the deeds to the husband; and he deposited them with the defendants, solicitors, as collateral security for mortgage money which he owed their client. Afterwards, the husband and wife mortgaged the settled lands in fee, subject to the term, without mention of title deeds; and they executed the power of appointment by giving a like power to the wife alone. The husband died; and the wife appointed to herself in fee. She then offered defendants to pay the debt due from her late husband to their client, on receiving back the title deeds, denying, however, that she was liable for such payment, but the defendants refused to deliver them unless they were paid also their own charges for business done for their client in respect of the mortgage to him.

In trover by the wife against defendants for the deeds, *Held*,

(1.) That the delivery of the deeds by A. to the husband was a rightful delivery, and enured to the benefit of the husband and wife during their joint lives, and afterwards of the wife as appointee under the power.

(2.) That the wife was entitled to hold the deeds as against the mortgagee in fee, having an interest in them in respect of her equity of redemption, no mention being made of them in the conveyance in fee, and the deeds never having been handed over to the mortgagee in fee.

(3.) That, even if this were not so, the defendants could not set up the right of the mortgagee in fee.

(4.) That the action lay against the defendants, though they held the deeds only as solicitors.

(5.) That the demand, accompanied by an offer to pay, was sufficient, though plaintiff at the same time denied her liability.

(6.) That the refusal to give up the deeds except on condition, which defendants had no right to impose, that their charges in respect of business done for their own client should be paid, was evidence of a conversion. *Davies v. Vernon*, 443.

2. Given up to tenant for life, accrue to benefit of him and remainderman, 443. *Ante*, 1.

3. Stranger may not set up *jus tertii*, 443. *Ante*, 1.

4. Effect of not mentioning them in conveyance, 443. *Ante*, 1.

5. Conversion by refusing to deliver, 443. *Ante*, 1.

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- I. Right to opportunity of.
- Removal from office without hearing, 683. *SCHOOLMASTER*.

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1. By plea or by motion, 587. *SCIRE FACIAS*, I. 1.
2. By plea or by cross action, 989. *SLAVE*, I. 1.

III. What is a defence.

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I. Of sheriff in execution of writ, 468. *SHERIFF*, I.

II. In application for discontinuance, 606. *FISH*.

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I. Of goods, 234. *VENDORS*, IV. 1.

II. In pleading.
Allegation of, in detinue, not traversable, 423. *DETINUE*.

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To ground action of trover, 443. *DEED*, III. 1, 769. *TROVER*, II. 2.

DEMISE.

COPYHOLD. LANDLORD AND TENANT. LEASE.

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- I. What defects available on.
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- II. Costs of, notwithstanding discontinuance, 383. *FAIR*, I.
- III. Admission by, 773. *PLEADING*, VII. 1.

DETINUE.

Pleading.

In a declaration in detinue, laying the property in the plaintiff, the common averment, that plaintiff delivered the chattel to defendant to be re-delivered on request, is not material or traversable. *Whitehead v. Harrison*, 423.

DEVISE.

- I. To person unknown, 631. *COPYHOLD*, III. 1.
- II. Effect of non-claim by devisee, 631. *COPYHOLD*, III. 1.
- III. Leasing powers, 208, 238. *LEASE*, I.
- IV. Legal estate.

When executed in cestui que trust.

Lands were devised (before stat. 7 W. 4, & 1 Vict. c. 26,) to L. and his heirs, in trust to permit and suffer A. to take the rents and profits during A.'s life, "with this proviso, to pay" W. out of the same an annuity for her

life, and, if A. died before W., to permit W. to enjoy the lands for her life: and, after the deaths of A. and W., deviser gave and devised the lands to the heirs male of A., remainder over.

A. and W. both survived the deviser. A. survived W., and, after W.'s death, suffered a common recovery.

Held that, assuming L. to have had a legal estate during W.'s life, A. was legal tenant in tail male after W.'s death, and that the recovery barred the estate tail and remainders. *Adams v. Adams*, 860.

DISCHARGE.

I. By supersedeas for not proceeding to execution, 544. *ARREST*, I.

II. From execution.

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2. Where a charter gives an absolute discretion, a by-law limiting it is void, 682. *SCHOOLMASTER*.

II. Exercise of.

A traversable fact: evidence of. *Regina v. Governors of Darlington School*, 696.

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Without hearing, under charter power, 682. *SCHOOLMASTER*.

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By conduct, 953. *LANDLORD AND TENANT* V. 3.

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I. Exemptions.

Goods in hands of a commission agent for sale.

To a plea in trover for a carriage, alleging that it was taken on the premises of B. as a distress for rent due from him, plaintiff replied that B. was a coachmaker and a commission agent for the sale of carriages, and exercised that trade on the said premises and was employed by plaintiff, in the way of his said trade and business, for certain commission, to expose for sale and sell the carriage on the said premises, and plaintiff had delivered the carriage to B. for the purpose that he might there expose for sale and sell the same for plaintiff in the way of his said trade and business for certain com-

gion, and B. had the same on the premises for that purpose, and the same remained thereon to be managed, and dealt with, sold and exposed for sale, as aforesaid, in the way of B.'s said trade and business, and not otherwise, until the time of the distress.

Held, that goods in the hands of a commission agent for sale in the way of his business are exempted from distress; and, (on special demurrer,) that the exemption was here sufficiently pleaded. *Findon v. McLaren*, 891.

II. For rent.

1. What is a rent certain.

The proprietor of a house and of a marl pit and brick mine demised the house, by unwritten agreement, to D. from a day named; and it was at the same time agreed between them, without writing, that D. should take the marl pit and the brick mine, and should pay quarterly, at the usual quarter days, 8d. per solid yard for all the marl that he got, and 1s. 8d. per thousand for all the bricks that he made. D. took the marl and made bricks accordingly, and paid the stipulated sums for a time, but they afterwards fell into arrear.

Held, that the agreement for the marl pit and brick mine was a demise of the land from year to year, at a rent capable of being ascertained with certainty, and for which, therefore, the lessor might distrain. *Daniel v. Gracie*, 145.

2. Effect of proceedings in insolvency.

It is no objection to a distress for rent that the tenant, after it became due, petitioned the Insolvent Debtors' Court under stat. 1 & 2 Vict. c. 110, inserted the rent in his schedule as a debt, was opposed in respect of it by the landlord, and obtained his discharge. *Phillips v. Sherrill*, 944.

3. Pleading: traverse of the tenancy.

Declaration in case alleged, in all the counts, that plaintiff held a messuage and premises, with the appurtenances, as tenant thereof to defendant at a rent therefore payable by plaintiff to defendant; and it complained, in the first count, that defendant took plaintiff's goods as and for a distress for alleged arrears of the said rent, whereas no rent was due; in the second count, of an excessive distress for arrears of rent claimed to be due for the said tenements; in the third count, of an irregular sale of goods seized as a distress for alleged arrears of the said rent.

Defendant, as to all the counts, traversed the holding modo et formâ. *Held*:

(1.) That the traverse was not immaterial;
(2.) That it was not too large, as putting in issue the tenancy of all the premises mentioned in the several counts. *Yates v. Tearle*, 882.

4. Remedy: trespass or case, 282. *Ante*, 3.

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I. Voluntary compromise of prosecution.

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2. Measure of damages, 468. *SHERIFF*, I.

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EXCISE.

I. Commissioners of.

Whether mandamus lies to them to grant a permit. *Regina v. The Commissioners of Excise*, 981 n.

II. Spirits.

1. Importation from the Channel Islands.

Although stat. 3 & 4 W. 4, c. 52, s. 40, in general terms authorizes importing into the United Kingdom any goods of the produce or manufacture of Guernsey, Jersey, &c., from the said islands on payment of the countervailing duties, such goods are nevertheless subject in this country to the internal regulations and restraints which may be imposed by the Commissioners of Excise under sect. 52, so far as the same will apply to imported goods.

And the Commissioners of Excise having made an order that manufactured spirits of the Channel Islands of the denomination of British brandy or British compounds, (defined by stat. 6 G. 4, c. 80, s. 101, and 5 Vict. c. 25, s. 6,) should not be admitted by permit into the stocks of rectifiers and dealers in the United Kingdom, but that plain spirits, certified to be the produce and manufacture of those islands, might be so admitted, subject to all the regulations affecting British plain spirits, care being taken that, under this order, no rectified or coloured or compounded spirits should be admitted.

Held, that the commissioners might legally refuse to grant permits for the delivery to a dealer in London of spirits imported from Jersey, on request notes which did not suffi-

ciently describe the spirits to show that they were admissible under the order.

Although, on application for a mandamus it was stated on affidavit that the spirits were in fact made of materials the growth, produce and manufacture of Jersey and of the United Kingdom; that the countervailing duty had been paid; and that delivery warrants from the proper officer of the customs had been lodged at the permit office. *Regina v. The Commissioners of Excise*, 975.

See stat. 8 & 9 Vict. c. 84, s. 2, and 8 & 9 Vict. c. 86, ss. 42, 55.

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I. What is.

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1. Debt for exacting excessive poundage on distress: venue: declaration, 100. *STATUTE*, V. 1.

2. Assumpsit for money extorted under colour of lien, 376. *ATTORNEY*, V. 1.

FAIR.

I. Custom to erect booths in highway, reasonable.

The council of a borough made the following by-law, by virtue of a charter empowering them to make by-laws, and of Stat. 5 & 6 W. 4, c. 76. s. 90.

That no person should erect any booth for the purpose of any show or public entertainment in any public place within the borough without license from the mayor, which license should not be given at or for any other time than during the annual fairs if three inhabitant householders, residing within one hundred yards of the place intended to be used, should have previously memorialized the mayor in writing to withhold such license: and that any such license given at or for any other time than during the said fairs should be revoked by the mayor and become void, if and so soon as three inhabitant householders residing within one hundred yards, &c., should memorialize the mayor in writing to revoke the same; such last mentioned memorial to be presented within forty-eight hours after the building of such booth should have been commenced, and the revocation to be notified forthwith to the party employed or interested in the building: and any person erecting or continuing a booth in contravention of the by-law, to forfeit a sum not exceeding 5*l*.

Held, an unreasonable by-law, and wholly void, though duly published and notified to a secretary of state and not disallowed.

To a count in trespass for breaking down and removing plaintiff's booth, defendant pleaded that, before and at the time when, &c., there was a public highway, *through, over and along a close* called A., for all the liege subjects, &c.; and that the booth had been and was wrongfully erected and standing *in and across the said highway*, and obstructing the same, wherefore defendant, being a liege subject, &c., and having occasion to use the said highway, committed the alleged trespasses, in order to remove the obstruction. Replication: That the said close is in the borough of B., which is an immemorial borough, and that an immemorial fair for the sale of all kinds of goods was, for three weeks from a certain day in every year, holden in the said close, that is to say on certain parts thereof used for that purpose, but *leaving open a sufficient part of the said close, and also of the said highway, for the subjects, &c., to go, return, pass, &c., in and along the same highway*. And that there was an immemorial custom in the said borough, that every liege subject using the trade of a victualler, hath during the said fairs been used, &c., for the purpose of carrying on his said trade, to enter upon any part

of the said close used for the purpose of such fair, but leaving as aforesaid, and, for carrying on his said trade, to erect a booth there, and to continue such booth until a reasonable time after the end of such fair, paying a reasonable compensation to the owner of the soil. And that plaintiff, being a liege subject and a victualler, did, during such fair, erect his said booth on one of the parts of the said close then and theretofore used for the fair, (leaving as aforesaid,) according to the custom, and continued such booth there till defendant, during the fair, committed the trespasses.

Held, on demurrer, that the custom was reasonable, for that a highway might have been granted before legal memory, subject, in parts, to interruption for a beneficial public purpose and for a limited time.

And that the plaintiff was right in replying specially as above, and could not have traversed the existence of a highway over the locus in quo, because, consistently with the custom, that spot might sometimes be used as a highway and sometimes not, and it did not, by temporary occupation under the custom, cease to be a highway.

Issues being joined in law and in fact, the plaintiff, after judgment against him on the former, the latter being untried, obtained a rule to discontinue on payment of costs. On taxation, the master made his allocatur for the plaintiff's and defendant's costs respectively, not striking a balance. The plaintiff, to whom the larger sum was due, took out execution for the balance between his costs and the defendant's.

Held, that he was entitled to his costs of demurrer, notwithstanding the discontinuance. And

The court refused, on motion, to set aside the execution as irregularly issued for a balance instead of the gross sum awarded for costs. *Edward v. Bullock*, 383.

- II. By-law restricting, when bad, 383. *Ante*, I.
- III. Pleading, 383. *Ante*, I.

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IV. Trover for seizure and sale under.

- 1. For selling more than sufficient to satisfy the execution.

Trover against sheriff for goods particularly described in the declaration. Plea, that defendant seized and sold the goods under a *fi. fa.*, at the suit of J. Replication, that the conversion complained of in the declaration is not the seizing and taking of the goods in the plea mentioned under the said writ, and that plaintiffs sue, not in respect of such seizing and taking, nor of goods seized, taken and sold under the said writ, but for that plaintiffs were lawfully possessed of the goods in the declaration mentioned which were other than and different from the goods seized, &c., by defendant under J.'s writ, and that defendants converted and disposed of the said goods in the declaration mentioned, &c. Plea, Not guilty.

It was proved that the sheriff received J.'s writ, and seized under it goods of the debtor, including those claimed in the action of trover: he then received a writ at the suit of C., which afterwards proved invalid. After receiving the second writ he sold the goods on two successive days. The first day's sale produced enough to satisfy J.'s writ: the action of trover was brought by the assignees of the debtor, (who had become bankrupt,) for the goods sold after J.'s execution was satisfied.

Held, that the sale was not to be considered entire and indivisible; but that the sheriff, after selling enough to satisfy the first writ, was liable in trover for the goods sold beyond that amount.

And that plaintiffs were right in new assigning, and ought not to have pleaded a mere traverse of the allegation that the goods were sold under J.'s writ.

A sheriff, after selling enough, to satisfy an execution, is not justified in selling more on the supposition that, by accident for which he is not answerable, the amount levied may become insufficient. *Aldred v. Constable*, 370.

2. New assignment, 370. Anté, 1.

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Plaintiff, while fishing for pilchards, had nearly encompassed the fish with a net; but defendant, by rowing his boat to the opening, disturbed the fish and prevented the capture. Plaintiff brought trespass; and issues being joined, 1. on plaintiff's possession of the fish: 2. on the fish being plaintiff's, in manner, &c.: *Held*, that he was not entitled to recover; no special custom of the fishery being proved.

In ordinary cases the court will not grant leave to a plaintiff to discontinue, where a verdict has been found against him and is not special. Assuming that under peculiar circumstances the court would grant such leave, they will not do so if there has been a delay, not sufficiently accounted for. As where a verdict for plaintiff was set aside on motion in Hilary term, and the verdict entered for defendant, and the plaintiff moved in Trinity term to discontinue, without any explanatory affidavit. *Young v. Hichens*, 606.

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I. Presumption.

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II. Debt on.

On decree of colonial court of equity ordering payment of money.

Declaration in debt charged that defendant was indebted to plaintiff in 88821, by virtue of a decree and sentence of the Supreme Court of Newfoundland, (established by stat. 5 G. 4, c. 67,) in a cause on the equity side of the said court, wherein the now plaintiff and others were plaintiffs, and the now defendant was defendant, by which decree it was ordered that defendant should pay plaintiff the said sum.

(1.) Plea, that the decree was made in respect of matters of trust and executorship accounts, not cognisable in a court of law. *Held*, bad, debt being maintainable at law on a decree of a colonial court of equity simply ascertaining a balance and ordering payment by defendant to plaintiff.

(2.) Plea, that plaintiff sued in the Supreme Court as widow of H. in right of H. without showing any right of representation to warrant such suit, and that the decree was made on matter of complaint solely in right of H. *Held* bad, because whatever constituted a defence in that court ought to have been there relied on; and because this court would assume that right had been done there, unless something appeared to have been done repugnant to natural justice.

3. Pleas showing a set-off for debts from H., or his estate, to defendant. *Held* bad, because the plaintiff sued in her own right, in this court, and the defence, if available at all, was one which ought to have been made in the Supreme Court. *Henderson v. Henderson*, 288.

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IV. By insuring in single name instead of in joint names, 953. LANDLORD AND TENANT, V. 3.

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ACTION.

GAME.

I. Offences in respect of: form of conviction.

Stat. 9 G. 4, c. 69, s. 1, gives a summary conviction, if any person "shall by night use

lawfully enter or be in any land, whether open or enclosed, with any gun," &c., "for the purpose of taking or destroying game."

A conviction set forth that C. did, by night, "unlawfully enter certain enclosed land," "with a net for the purpose of taking game, to wit partridges and pheasants, contrary to the form," &c.

Held bad, for not stating the intent to be to take game *there*. *Fletcher v. Calthrop*, 880.

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Held, that this was a continuing guarantee. And that, as to all the debts guaranteed, it was an agreement relating to the sale of goods, within the exemption in the Stamp Act, 55 G. 3, c. 184, Sched. Part I. *AGREEMENT*. *Martin v. Wright*, 917.

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I. At common law, for defect in warrant of commitment.

Under the Convention Act, 6 & 7 Vict. c. 75, for committing and delivering up to justice, on requisition by an agent of the king of the French, persons accused of certain crimes done in France, a warrant to detain a party so accused "until he shall be discharged by due course of law" is insufficient; and the party imprisoned under it is entitled to his discharge on habeas corpus.

The habeas corpus for that purpose is claimable at common law.

On habeas corpus, and motion to discharge from such imprisonment for an offence committed abroad, the warrant being defective, the court, (assuming that they could look into the depositions referred to by the warrant,) cannot on their own authority remand the prisoner as a person charged with a crime. *Besset, Ex parte*, 481.

II. The court has no original authority to remand on the ground that the warrant charges the party with a crime, 481. *Ante*, I.

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II. Surveyor.

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III. Ratable property.

Such woods as have heretofore been usually rated.

In the Highway Act, 5 & 6 W. 4, c. 50, s. 27, which directs the surveyor to rate all property then liable to be rated to the poor, provided that the same rate shall also extend to such woods, mines, &c., as have heretofore been usually rated to the highways, the words "usually rated" refer, not to legal

ratability, but to rating in point of fact, and to the practice of rating in the particular parish, not in the country generally.

On appeal against a surveyor's rate on timber woods, the sessions found for the appellant, subject to a case, which stated that the woods were not liable to poor rate: that, from 1809 down to the passing of stat. 5 & 6 W. 4, c. 50, they had not been rated to the highways: and that timber woods of a like description had always been rated to the highways in the majority of parishes in the country and neighbourhood, but in some they had not been so rated since 1809.

Held, that the appellant's woods were not shown to be chargeable under sect. 27. *Pagina v. Rose*, 183.

IV. Enforcement of repair.

Costs of prosecution.

Under stat. 5 & 6 W. 4, c. 50, s. 95, the judge has no power to direct the costs of an indictment for non-repair of a road, preferred by the direction of justices, to be paid out of the highway rate, except where there is a highway, and the liability to repair it is in dispute.

Therefore, where defendants had been acquitted on the sole ground that the road in question was not a highway, and the judge certified for costs under this section, this court set the certificate aside. *Regina v. Heanor*, 745.

V. Obstruction by trees. Order to remove.

1. What it must show.

Plaintiff below demised land by indenture, excepting all timber, timber trees, and other trees, &c., bushes and thorns, *other than such bushes and thorns as should be necessary for the repair of the fences*; the lessee covenanted to keep the fences in repair during the term, finding all materials, except that the lessor should find rough wood for such repairs, if growing upon the premises; and the lessor covenanted during the term to provide the lessee sufficient rough timber, stakes and bushes, if growing on the premises, for doing such repairs.

Held, *dubitante* POLLOCK, C. B., that the provision as to bushes and thorns necessary for repairs was not an exception out of the exception, but that all trees, bushes, and thorns were excepted out of the demise, whether part of the fences or not; and that, on the trial of an action against wrong-doers for cutting some of the bushes and thorns, a direction by the judge, that if they were cut by the defendants, the plaintiff was entitled to a verdict, was right, without previously putting any question to the jury whether the bushes, &c., were part of the fence, or were necessary for repairs.

Semble, that, before the lessee could take any of the thorns, &c., for repairs, they must

have been assigned for that purpose by the lessor.

The Highway Act, 5 & 6 W. 4, c. 50, s. 85, enacts that if the surveyor shall think that any carriage way is prejudiced by the shade of any hedges, or by any trees, except trees planted for ornament, &c., and that the sun and wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriage way by any hedge or tree, the owner of the land on which the hedge, &c., grows, next adjoining to such carriage way, on the surveyor's information, may be summoned before a special session, to show cause why the hedges are not cut, pruned or plashed, or such trees not pruned or lopped, in such manner that the carriage way shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriage way to the damage thereof, or why the obstruction caused in such carriage way should not be removed; and, if the justices shall order that such hedges shall be cut, pruned or plashed, or such trees pruned, &c., in manner aforesaid, or such obstruction removed, the owner shall comply within ten days after the service of the order, and in default thereof shall be subject to a penalty; and the surveyor, if the order be not complied with, is authorized and required to cut, prune or plash such hedges, and to prune, &c., such trees, for the benefit of the highway, and to remove such obstruction, to the best of his judgment, and according to the true intent of the act. By sect. 105, any person thinking himself aggrieved may appeal to the quarter sessions, first giving notice of appeal within fourteen days after cause of complaint.

At a special session for the highways an order was made, reciting a complaint by the surveyor, that the owner had neglected to cut, prune or plash certain hedges and trees upon his farm, on the right hand side of a certain carriage way, situate, &c., whereby the sun and wind were excluded from the said carriage way, to the damage thereof, and whereby also obstructions were caused in the same carriage way, contrary to the statute, &c.; and that the owner had appeared and the said offence was proved; and the justices did thereby order the owner to cause the said hedges to be cut, &c., and the said trees pruned, &c., and the said obstructions complained of, to the injury or damage of the said highway, removed, within ten days from service of the order. The owner cut away some part of the hedge; but the surveyor, considering the order not properly complied with, himself cut the hedge after the lapse of ten days, the owner not having in the mean time appealed. Trespass being brought, the judge, at the trial, directed the jury that, although the plaintiff had not ap-

pealed, the surveyor was not justified unless the order was valid: *Held*, that the direction was right

The judge, at the trial, also directed the jury that the order was bad.

Held, that the statement that the trees were on plaintiff's farm, and on the side of the road, was equivalent to a statement that he was the owner of the *land next adjoining the road*, so that the order was not bad altogether for omitting to show that fact.

Held also, that, the exclusion of sun and wind being one of the injuries complained of, the order was bad in part, as not stating the extent to which the cutting, &c., should take place with reference to that injury: *Seemle*, that a direction to cut, &c., so as to prevent the sun and wind from being excluded, would have been sufficient, without any more precise orders as to the extent of the cutting.

Held also, that the order was bad as to trees, for not showing that they were not planted for ornament, &c.

But *held* also, that it sufficiently appeared by the order that there was a complaint of actual obstruction to the highway by hedges and trees which required cutting, &c., and a direction to remove that obstruction: wherefore, as the surveyors had lawful authority for part of the trespasses for which the damages were given, a venire de novo must be awarded. *Jenney v. Brook*, 323.

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An order of quarter sessions, brought up by certiorari, appeared to be an order quashing an indictment containing counts for forcible entries, assaults, and a riot. On motion to quash the order: *Held*,

1. That the sessions, having jurisdiction over the subject matter of the indictment, had jurisdiction to quash it; and, as to this, it made no difference that the defendants had been held to bail more than twenty days before the sessions, and had given the prosecutor notice of their intention to appear there; stat. 60 G. 3, & 1 G. 4, c. 4, s. 5, not taking away the common law power of a criminal court to deal with an indictment properly before them.

2. That this court therefore would not inquire, on this proceeding, whether the indictment was properly quashed; but that the proper way of raising such a question was on writ of error.

3. That this court would not, on such proceeding, allow a discussion as to the motives upon which the quarter sessions acted.

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Held, that judgment non obstante veredicto could not be awarded, as it would be incon-

sistent with the judgment already given that the plaintiff should not recover.

And that a repleader could not be awarded, as the parties must, in that case, be ordered to replead from the plea downwards, and such direction would lead to an absurdity on the record, since the court had already held the declaration bad. *Willoughby v. Willoughby*, 722.

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On appeal against an order, under stat. 4 & 5 Vict. c. 59, s. 1, directing the surveyor of the highways to pay the commissioners of a turnpike trust a sum of money to be laid out in the actual repairs of the turnpike road, the justices making such order are interested parties.

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That the covenant to insure in the joint names was a continuing covenant, and was not waived by the conduct of the lessor, except as to past breaches. And that the ejectment lay. *Doe dem. Muston v. Gladwin*, 953.

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1. *Held*, that a lease by the tenant for life comprehending, at a single rent, as well some of the lands devised, as others not devised and not previously let with those devised, was bad as to the lands devised, although the rent reserved, with the heriots, &c., was in proportion to the rents, &c., previously reserved on all respectively.

2. But that, against a party claiming as heir of the lessor, the lease was good as to the lands not devised.

3. That, if the lease had comprehended only lands devised, it would not have been avoided by proof that the lands included in the lease had never before been let by a single demise; it also appearing that the rents, &c., reserved were in proportion to the rents, &c., formerly reserved.

4. That the lease was not avoided by its containing a stipulation that the lessee should build a new dwelling-house, and might pull down an out-house and use the materials for so building; no other facts being proved to show that this would amount to waste.

5. A., parcel of the lands devised, and leased by the tenant for life, had previously been demise by a lease containing a stipulation that the lessee should do suit by grinding at a certain mill; but a later lease of A., which was granted by the testator and running when the will was made, contained no such clause. *Held*, that a lease by the tenant for life was not bad for not containing such a clause.

6. C., also parcel of the lands devised, and leased by the tenant for life, had previously been leased by a deed which contained the same stipulation immediately after the *reddendum*. The lease following this, which was granted by the testator and running at the time of making the will, was lost. *And*, (the court having power to find facts on a special case stating as above,) that it was to be inferred that such a stipulation was a usual and reasonable covenant. And this, whether evidence (which was offered) were or were not admissible that the testator had frequently leased other parcels of the manor which included A. and C., omitting the stipulation in all such leases, though the previous leases of those other parcels contained it.

7. *Held*, that a lease of C. by the tenant for life which did not contain the stipulation was therefore void. *Doe dem. Egremont, Earl, v. Stephens*, 208.

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5. Condition for re-entry on non-performance of covenants.

Power, under a will, to tenant for life to grant leases, so that in every such lease there be contained the usual and reasonable covenants, and "a condition of re-entry for non-payment of the rent or rents thereby respectively to be reserved, in case the rent or rents be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained."

Lease, with a covenant to repair, and proviso for re-entry, if the tenant should suffer the premises to be out of repair, and

should not repair the same "within six calendar months next after notice."

Held, void, as a bad execution of the power. *Doe dem. Egremont, Earl, v. Burrough*, 329.

II. Exceptions.

1. Timber other than such bushes, &c., as shall be necessary for repairs of fences, 323. *HIGHWAY*, V. 1.
2. Out of exception, 323. *HIGHWAY*, V. 1.
3. What question for judge or for jury, 323. *HIGHWAY*, V. 1.

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Duty.

Revocation of probate after payment of duty; repayment.

By an instrument purporting to be the will of S., deceased, the whole of S.'s personalty, amounting in the net to 12,748*l.*, was bequeathed to J., a stranger in blood, who was made executor. J. took out probate, and paid the duty of ten per cent. on the whole net. Afterwards T., the next of kin to S., disputed the will, on the ground that S. was not of disposing mind. J. paid 6000*l.* to T., and consented that the will should be revoked, and administration taken out by T., who, in consideration thereof, released to J. her claim on the 12,748*l.* T., from her nearness in blood, was liable to a duty of less than ten per cent.

Held that, under stat. 36 G. 3, c. 52, s. 37, J. was entitled to a return of duty, not only on the 6000*l.*, but also on the remaining 6748*l.*, and that the duty on the whole 12,748*l.* was to be accounted for between T. and the commissioners of stamps, as duty charged on T., at the lower rate. *Regina v. Commissioners of Stamps and Taxes*, 657.

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When executed in cestui que trust, 860. *Dr-vise*, IV.

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For breach of covenant, 953. *LANDLORD AND TENANT*, V. 3.

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Removal of lunatic pauper to, 501. *POOR*, XXIX.

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1. Of mortgagee's attorney as against mortgagor, 276. *ATTORNEY*, VI. 1.
2. Of attorney on money had and received by him on account of his client, 356. *Post*, III.

II. Discharge of.

By refusal of tender under protest, 443. *Dann*, III. 1.

III. Pleading.

When bad, as substituting a different contract.

Assumpsit against E. and H., attorneys, for money had and received. Pleas, that plaintiff had retained and employed E. as his attorney, and was indebted to him for work, &c., and thereupon plaintiff and defendants agreed that, in lieu of the sole retainer of E., defendants should be jointly retained and employed by plaintiff as his attorneys, and that they should have a lien upon all moneys which they should receive for plaintiff in the course of such employment, to the amount of all debts that then were or thereafter should be due from plaintiff to E. solely or to defendants jointly in respect of the said retainers and work, &c., respectively; and that they should hold and apply the same on account and in discharge of such debts to E. or to defendants jointly, and thereout pay to E. and to defendants the said debts respectively.

Averment that defendants, on such joint retainer, did work, &c., for plaintiff; and there became due, and was still due, from him to them in respect thereof a certain sum, which, together with the said debt to E., exceeded the amount claimed in this action. That defendants received the amount so claimed to the use of plaintiff in the course of their said retainer and employment, and as the attorneys of plaintiff, and under and by virtue of their said retainer and employment, and subject to the said lien, and held and applied part thereof (*viz.* &c.) on account and in discharge of the debt due to E., and paid him the same, and the residue, (*viz.* &c.) on account and in discharge of the debt due to defendants, and paid themselves the same.

Held a bad plea, as substituting a different contract for that declared upon, and consequently amounting to the general issue. *Williams v. Vines*, 355.

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Bar by receipt of interest by husband of payee of note, 937. *BARON AND FEN*, III. 2.

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I. When granted.

1. To parish officers to account to auditors, 78 *Poon*, III. 1.

2. To justices, to enter continuances and hear appeal, 163. *Poon*, XXIII. 3. 750. Post, II. 3.

3. To corporation to ~~less~~ compensation, 433. Post, IV. 2.

4. To admit heir, after seizure-quousque, 631. *Cornford*, III. 1.

To restore schoolmaster, 682. *School-master*.

Whether it lies to commissioners of excise to grant a permit. *Regina v. The Commissioners of Excise*, 981 n.

II. When refused.

1. Because there is another equally effectual remedy.

Action of debt for compensation.

Stat. 6 & 7 W. 4, c. lxxx., incorporating the Hull and Selby Railway Company, and empowering them to build a bridge over the Ouse, recited that the building of such bridge might diminish the tolls received at a neighbouring bridge over the same river, belonging to another company. It therefore enacted that, if, in the first three years after the opening of the railway, there should be an annual decrease in the tolls of the last mentioned bridge, as compared with the tolls during the three preceding years, the railway company should forthwith pay the bridge company a sum equal to ten years' purchase of such annual decrease, taken upon an average of the three years in which it occurred. The decrease took place; and the compensation was claimed.

Held, that debt lay against the company for the amount; and that a mandamus to pay was not a more effectual remedy, and ought not to be granted. *Regina v. The Hull and Selby Railway Company*, 70.

2. Because a previous application has been refused.

Where a rule for a mandamus to compel a corporation to make an order has been discharged, on the ground that no demand and refusal have taken place, the court will not grant a new rule for a mandamus to the same effect, though a demand and refusal have taken place since the discharge of the former rule. *Ex parte Thompson*, 721.

3. Because it is not shown that the party to be commanded has been wrong.

On application for a mandamus to the sessions to enter continuances and hear an appeal, it appeared from the affidavits that an application to enter the appeal was made on the second day of sessions, and not before, and refused. It not appearing what the practice was, nor that the sessions had refused on any ground except that of prac-

tice, this court discharged the rule for a mandamus.

Though it appeared that a question might have arisen whether the appellants were not precluded by a former appeal which they had entered but had not prosecuted; on which question this court gave no opinion: *Reginald v. Warwickshire Justices*, 750.

III. To whom to be directed.

To assess compensation: to corporation, or to town council, 433. Post, IV. 2.

IV. Writ: defects in, how available.

1. On demurrer to traverse of return.

On demurrer to a traverse of the return, to a mandamus, the defendant may impeach the validity of the writ.

So held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench. *Clarke v. Leicestershire and Northamptonshire Canal Company*, 898.

2. Not quashed after return and trial of issue on grounds that might have been discussed on showing cause against application.

A resolution, on the reappointment of a town clerk by a corporation after stat. 5 & 6 W. 4, c. 76, to increase his salary in compensation for the loss of former emoluments, is not valid unless executed under seal.

Such reappointment cannot, therefore, be proved by an entry of it in the minutes of the town council.

After a mandamus has been granted, return made, and an issue thereon tried, the court will not quash the mandamus on grounds which were or might have been discussed on showing cause against the application for it; as, that a suggestion on which the motion was made is untrue.

A mandamus for compensation, under stat. 5 & 6 W. 4, c. 76, s. 66, was moved for on the ground that the prosecutor had by the passing of the act lost the emoluments of an office, and that, although he had since been reappointed to another office at an increased salary, there had been no agreement between the prosecutor and the corporation that such increase should be deemed a compensation for the loss. On return, and trial of an issue bringing this fact into question, the judge and jury declared themselves of opinion that such an agreement had existed. *Held*, no ground for quashing the mandamus.

The mandamus required the corporation, by its corporate style, to assess compensation, (instead of requiring the council to assess compensation, and the corporation to execute a bond.) After return, and issue in fact tried.

Held, that, assuming the writ to be materially defective in form, the court ought not to quash it on motion. *Regina v. Stamford Mayor, &c.*, 433.

3. When not on motion, 433. Antè, 2.

V. Judgment.

For party making return, non obstante veredicto, 682. **SCHOOLMASTER.**

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1. Where grantee acquires the soil subsequently to the grant.

The word "toll" in a grant may include stallage.

And, if the crown grant to H. and his heirs that they may have and hold a market in the town of E., with all tolls and profits thence arising, but neither the crown nor H. has any right of soil in the town, if H. afterwards acquires the soil on which the market is held, he may claim stallage by virtue of the grant. So held by the Court of Q. B. Judgment affirmed by the Court of Exchequer Chamber.

Held by the Court of Exchequer Chamber, that a modern grant by H., a subject, holding under the crown as before mentioned, to which certain persons, styled inhabitants of E., are parties, granting that the said "inhabitants of E.," their heirs and assigns for ever, shall enjoy the market as freely as H. held it of the crown, and containing a covenant by H., that they shall do so, does not exempt from stallage an inhabitant not privy to the parties to such grant.

Such an exemption for the inhabitants of a town can be only by way of custom, not of grant or prescription.

Whether an exemption or discharge from toll, other than stallage, could be claimed by such grant or prescription for inhabitants generally, *quære*. **Lockwood v. Wood, 31.**

2. To inhabitants, by subject holding under crown, 31. **Antè, 1.**

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1. By grant, custom, or prescription, 31. **Antè, I. 1.**

2. By custom; what enjoyment no evidence of. **Lockwood v. Wood, 67 n.**

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VI. Nemo potest esse simul actor et judex in eadem causa, 753. **JUSTICE, IV.**

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I. Assignment: deed stamp on further security.

P. demised land to V. for one thousand years, to secure a loan. By a subsequent deed he charged the premises with payment to V. of a further loan, making the whole 150*l.* V. called in the money; and B. and C. having agreed to advance it, an indenture was executed, whereby, in consideration of payment of the 150*l.* to V. by B. and C. and of 15*l.* advanced by them to P., the mortgagor, P. appointed that the land should remain, &c., to the use of B. and C., their heirs, &c., with proviso for reconveyance on payment by P. of the 165*l.* and interest, and with a covenant by P. to pay the same; and V., the prior mortgagee, assigned the term of one thousand years to B. and C.

Held, (under stats. 55 G. 3, c. 184, sched. tit. *Mortgage*, and 3 G. 4, c. 117, s. 2.) that

on this last deed an ad valorem stamp of 1*l*. (in respect of the additional 15*l*.) with stamps for progressive duty, was not sufficient, the conveyance of the fee creating a new security, in respect of which a deed stamp was necessary. *Brown v. Pegg*, 1.

II. Further security.

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I. When awarded on bill of exceptions, 323. *HIGHWAY*, V. 1.

II. On what omission at the trial, not granted.

An assignment of goods in fraud of creditors is valid as between parties to the deed, and as between either party and a stranger.

A sheriff claiming to seize the goods on behalf of a judgment creditor is a stranger within this rule, if he does not prove the legal authority under which he seized on behalf of such creditor.

For this purpose it is sufficient, in trespass for the seizure, if he prove the writ.

And there is some evidence of the writ, if the plaintiff puts in the sheriff's warrant to his officer, and that recites a writ at the suit of the judgment creditor.

The judge, in an action brought against the sheriff as above, left it to the jury to say whether or not the parties to the alleged fraudulent conveyance meant any thing to pass by it; the jury found in the negative, and a verdict was taken for the defendant. The case went to the jury without notice of any proof that the sheriff acted under a writ sued out by the judgment creditor, the effect of the recital in the warrant being overlooked by all parties. A new trial was moved for on the ground that the sheriff, if standing in the situation of a stranger, could not im-

peach the deed; and the court was of this opinion; but, on showing cause, the effect of the recital in the warrant was pointed out, and admitted by the court.

Held, that a new trial ought not to be granted on the ground merely that the cause had been tried on an assumption that the alleged fraud would be a defence to the sheriff, without taking the jury's opinion on the effect of the recital as showing his right to make such defence. *Bessey v. Windham*, 166.

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On application under stat. 4 & 5 W. 4, c. 62, s. 27, to a superior court in Westminster Hall for a new trial of a cause in the Common Pleas at Lancaster, the recognition "to make and prosecute such application" is satisfied by obtaining a rule nisi, whatever afterwards becomes of the rule. *Haworth v. Ormerod*, 300.

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After motion to reverse an outlawry has been discharged, the court will not reverse it on a new motion founded upon affidavits not stating any fact subsequent to the first application, but will put the defendant to his writ of error. *Stulz v. Wyatt*, 666.

II. Disabilities of outlaw.

An outlaw cannot, for his own benefit, move to have an attorney's bill taxed.

So held where the outlaw was administrator, with the will annexed, by which all the

personal estate was bequeathed to him, subject to payment of the debts, &c., and one of the bills which he sought to tax related to business done for himself and the testatrix jointly, and the other to business done for the testatrix alone. *Mander, in re*, 867.

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Liability for preliminary expenses towards formation of a company that is never completed.

Certain persons proposing to form a company, applied to defendant to become president, to which he assented, and permitted himself to be publicly named as president of such intended company. The company was never formed; but meetings preliminary to the formation of it were held, at one of which defendant presided.

Held, that a jury might, if they thought fit, infer that defendant by his conduct held himself out as contracting for work to be done in respect of such preliminary proceedings, though the order for such work and labour was not directly given by the defendant. And that defendant, if he so held himself out, was liable for the work performed. *Lake v. Argyll, Duke*, 477.

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Laches of plaintiff in not collecting defendant's moneys in satisfaction.

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That, before action brought, defendant gave plaintiff, and he received from defendant, authority to receive, for defendant and as his agent, moneys exceeding the sum in the declaration mentioned, then due to defendant, and to pay himself thereout in full satisfaction and discharge of the promises, &c., and of all damages, &c.; and defendant at the time of giving such authority did at plaintiff's request intrust him with the sole collection of the said moneys, on the terms then assented to by plaintiff and defendant, that plaintiff should use reasonable diligence in endeavouring to collect the same, and defendant should not collect or endeavour to collect them otherwise than by plaintiff's agency so created as aforesaid; that afterwards, and before action brought, plaintiff had the option of receiving, and might and ought to have received, the said moneys, to an amount exceeding the present demand, in pursuance of the said authority, and had also the option of paying himself, out of the moneys which he might have so received, the amount now claimed, in such satisfaction, &c.: and that plaintiff did not nor would use reasonable diligence, &c., in endeavouring to collect and receive the said moneys when he might have so received, and had the option of so receiving the same, but, while the said authority was in force, so

negligently conducted himself in endeavouring to collect and receive the said moneys, that by reason thereof he did not receive the same, or any part thereof, and thereby, and without defendant's default or consent, before action brought, the chance of the moneys or any part thereof being received by or on behalf of defendant became desperate, and the said moneys thereby were and are lost to him.

Held, on general demurrer, a bad plea of accord and satisfaction. *Gifford v. Whitaker*, 249.

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VII. Amendment under 3 & 4 W. 4, c. 42, s. 23, 362. AMENDMENT, II.

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I. Confession and avoidance, 682. SCHOOLMASTER.

II. Admission.

By demurrer, 773. Post, VII. 1.

III. Time.

That the authority pleaded subsisted at the time, 773. Post, VII. 1.

IV. Materiality.

1. Of traverse of tenancy, in case for im proper distress, 282. DISTRESS, II. 3.

2. What judgment given on an immaterial issue. ISSUE, VI.

V. According to legal effect.

Consideration for contract, 494. CONSIDERATION, I. 1.

VI. Largeness.

Of traverse, 282. DISTRESS, II. 3.

VII. Authority.

1. Every essential must be alleged with particularity.

To a declaration for false imprisonment, defendant pleaded in justification, that the Court of Review in Bankruptcy ordered that plaintiff should stand committed for a contempt of the court, and that a warrant should forthwith issue for that purpose. And that Sir G. R., one of the judges of the said court, afterwards, on, &c., according to the course and practice of the said court, made and issued out of the same court, upon the said order, his warrant in writing, whereby, after reciting the order, he directed the tipstaff of the court to arrest, &c. On special demurrer, *Held*:

1. That the words "according to the course and practice of the said court," with the context, did not necessarily imply that Sir G. R., at the time of issuing the warrant, was a judge of the court.

2. Or that, by the practice of the court,

when they ordered a party to stand committed for contempt, one judge might issue his warrant for the apprehension.

3. That these facts were essential to the plea.

4. That an arrest conformable to the practice of the court, was not admitted by the demurrer.

Assuming that the plea did, in substance, state the proceedings to be according to the practice of the Court of Review, *Held*, further,

5. That this court could not, on such general statement, pronounce the justification sufficient, since they could not judicially know rules of practice adopted by a court of recent origin, and never communicated to them. And

6. That, if they were to intend the practice of such court to resemble that of the superior courts at Westminster, it was not conformable to the practice that, on an order of commitment by the court, one judge should issue his warrant to apprehend. *Van Sandau v. Turner*, 773.

2. Necessary implication, 773. Antè, 1.

3. Judicial notice, 773. Antè, 1.

4. Practice, 773. Antè, 1.

5. Time, 773. Antè, 1.

VIII. Judicial notice.

1. When not of judges of other courts, 773. Antè, VII. 1.

2. When not of practice of other courts, 773. Antè, VII. 1.

IX. Intendment.

Illegality will not be intended, 989. *SLAVE*, I. 1.

X. It is not necessary to allege or negative matter that ought to come properly from the other side.

1. In sci. fa. against shareholder in privileged company on judgment against registered officer, 587. *SCIRE FACIAS*, I. 1.

2. Compliance with regulations introduced by statute into contract at common law, 989. *SLAVE*, I. 1.

XI. On statutes.

1. Contra formam statuti, when necessary, 100. *STATUTE*, V. 1.

2. Which party must show the compliance or non-compliance with statutory regulations, 989. *SLAVE*, I. 1.

POOR.

Churchwardens and overseers.

Order to pay to churchwardens and overseers of a township which has no churchwardens, 256. Post, XXV. 1.

II. Government under Gilbert's act, 22 G. 3, c. 83.

What not a discontinuance by the parishes of themselves, 115 n. Post, VI. 2.

III. Overseer's accounts.

1. To what auditors.

The Poor Law commissioners caused an

auditor to be appointed under stat. 4 & 5 W. 4, c. 76, s. 46, to audit the accounts of a union and the several parishes therein, to examine whether the expenditure was lawful, to strike out payments and charges not authorized by some provision of the law or order of the commissioners, and to see that the accounts were properly stated, with vouchers. A district within the union had already auditors under a local act (8 G. 4, c. clxxv.) which provided for the maintenance of the poor and regulation of the nightly watch. Their duty under the act was, to audit the accounts of the directors of the poor, which the directors were required to produce, with vouchers: no power of disallowing items was given to the auditors; but it was enacted that, if they disapproved of any part of the accounts, it should be lawful for them to appeal to the quarter sessions, entering into recognisance to pay costs if awarded against them: and the sessions were empowered to award costs to the appellant or the party appealed against.

Held, that the directors, though they had accounted to their own auditors according to the local act, were not thereby exempted from accounting to the union auditor under stat. 4 & 5 W. 4, c. 76, s. 47.

The officers accounting for the receipt and expenditure of the poor rate to an auditor appointed by direction of the Poor Law commissioners must account for all sums collected under the denomination of poor rate, and expended for any purposes, (as watching, police, &c.) to which, by local or general acts, the poor rate is applicable; not for those sums only which are raised and laid out strictly for the relief and management of the poor. *Regina v. Governors of St. Andrew, Holborn*, 78.

2. Of what sums, 78. Antè, 1.

IV. Auditors.

1. Under stat. 4 & 5 W. 4, c. 76, s. 46, 78. Antè, III. 1.

2. Under local acts, 78. Antè, III. 1.

V. Liability of officers.

Clerk to guardians is not liable to action for money voluntarily paid by plaintiff to compromise a bastardy indictment, 464. Post, XXVIII.

VI. Parish property.

1. Forfeiture by breach of covenant for exclusive use.

Land was demised to trustees for parish R., they covenanting to build a workhouse thereon, and to use, occupy, possess and enjoy the premises for the sole use, maintenance and support of the poor of R., and not to convert the building or the land, or employ the profits thereof, to any other use, intent or purpose whatsoever. Proviso for re-entry on breach of the covenant.

The house was built, and, together with

the land, used agreeably to the covenant. Afterwards stat. 4 & 5 W. 4, c. 76 passed; and the Poor Law commissioners incorporated parish R. in a union, and removed all the paupers to the union workhouse. The workhouse of R. became uninhabited, and was locked up; and the land was let at a rack rent, which was applied in aid of the poor rates. On ejectment brought (three years afterwards) for breach of the covenant,

Held, that no breach of the covenant appeared: but *Seemle*, that a breach caused by the compulsory operation of the statute would have been thereby excused. *Doe dem. Angelsea, Marquis v. Rugeley*, 107.

2. What not a discontinuance by the parishes of themselves.

Land was demised for one thousand years by indenture (A. D. 1793) to A. and B., the latter described as visitor and guardian of the poor of the parish of C., their successors and assigns, under stat. 22 G. 3, c. 83, (Gilbert's act,) for the purpose of erecting a poorhouse thereon, and occupying and cultivating the same for the use and benefit of such poorhouse, and of the poor of C. and such other parishes as should be united therewith for the purposes of the act. Proviso for re-entry if C. and all the other parishes which should or might at any time be so united should of themselves discontinue to adopt the provisions of the statute. Further proviso that, if, during this demise, the legislature should repeal Gilbert's act, so that the poor of the several parishes should no longer be permitted to remain under the care of the visitor and guardians of such parishes, it should be lawful for the visitor and guardians, their successors and assigns, yielding up the land to the lessors, to pull down the said poorhouse and carry away the materials.

The house was built; and C. and other parishes adopted the provisions of the act; and C. continued to follow them till the making of the after mentioned order: but the other parishes seceded from the union. In 1836 the Poor Law commissioners incorporated parish C. in the Hambledon Union, and ordered all the paupers to be removed to the union workhouse; after which no paupers were received into the poorhouse of C. but persons requiring only out-door relief; and the parish officers issued a notice proposing to let part of the house and the land.

Held, no forfeiture under the first proviso. *Doe dem. Grantley, Lord, v. Butcher*, 115 n.

VII. Ratable property: beneficial occupation.

Purposes to which revenues are applied, 787.

Post, X.

VIII. Ratable property: local undertaking.

A market, 787. Post, X.

IX. Ratable property: railways.

Value how to be calculated: deductions.

The Great Western Railway Company were occupiers of a railway, their property, and constructed by them, and of branch railways which they rented: and they used the several lines as carriers for hire, working the whole as one concern. In the parish of T. through which the main line passed, they were rated for the railway as follows.

The gross receipts on the several railways were added together, and the total divided by the number of miles in all the railways. The expenses on all, allowable as deductions from poor rate, were added together and divided in the same manner. The expenses on the number of miles in T., the calculation for each single mile being as above, were then subtracted from the receipts thereon, and the assessment was made on the residue, with an allowance for interest on the plant or movable stock, and for tenant's profits, including profits of trade.

On appeal against the rate, further deductions were claimed, as follows; and the sessions stated a case for the opinion of this court on the legality of them.

1. For stations and other buildings appurtenant to, and necessary for the profitable enjoyment of the railway, but rated or ratable separately from it, and in other parishes than T. *Held* allowable.

2. Allowance having been made in the rate for "maintenance of way," a further deduction was claimed for depreciation and wear and tear of rails and sleepers, being the solid timber and iron work of the principal line. The renewal of these had been paid for out of the company's capital, not their revenue. *Held* not allowable.

3. Interest upon outlay in forming the company, obtaining their act of incorporation, (5 & 6 W. 4, c. cvii.) raising the capital, and other original expenses. *Held* not allowable.

4. "Income tax paid by the company in pursuance of stat. 5 & 6 Vict. c. 35, amounting in the whole to 10,000*l*." *Held* allowable so far as regards the tax imposed in respect of mere occupation.

"Additional parochial assessments, not actually paid, but which will be payable in consequence of the recent decisions of this court on the rating of railways." *Held* not allowable.

6. The branch lines were worked at a loss, which the company incurred solely on account of the increased traffic occasioned by those lines on the principal railway; and a deduction was claimed for this loss. *Held* not allowable.

7. In estimating the tenant's profits, a percentage was taken on the original value of the movable stock, at such a rate as might reasonably induce a lessee, obtaining that amount of profit, to pay the residue of profits

as rent. The appellants contended that the percentage should have been taken on the gross receipts. *Held*, that this was a question for the sessions, not for the Queen's Bench.

8. The following increase of assessment was claimed by the respondents. The movable stock had, in making the rate, been estimated at its original value, which exceeded the actual value at the time of assessment. The respondents insisted that any calculation of the value for the purpose of reducing the rate should be taken according to the latter state of the property. *Held*, that the estimate ought to be so taken. *Regina v. The Great Western Railway Company*, 179.

X. Ratable property ; revenue applied to special purposes.

Trusts of market, after payment of debts and expenses, for poor inhabitants of another parish.

Stat. 9 G. 3, c. 44, empowered trustees to purchase certain lands, &c., in the town of Taunton, and convert them into a market-place, and vested the lands, &c., and all buildings, &c., to be built thereupon, and the rents and profits, in the trustees and their successors, in trust, out of the first moneys to be raised under the act, to pay the costs of obtaining the act, all debts to be incurred by the purchase of the site and erection of the market, the expenses of lighting certain streets in the town, the expenses of purchasing the stalls, &c., in the then present market, and also certain mortgages, and the interest thereof. It was enacted that, after the discharge of the same, and of all debts on account of the market, &c., the market, &c., should remain in the trustees in trust as an estate for the use and benefit of the parish of M. in Taunton, and should and might be applied by the trustees to the clothing, educating and placing out apprentices of so many of the children of the poor inhabitants of M. as the trustees should from time to time direct. It was further provided that the share and proportion which the several grounds, &c., to be vested in the trustees by virtue of the act, were charged with to the land tax and church and poor rates in the year 1768, according to the rents of the same as they were then rated, should be for ever paid by the trustees to the proper officers in lieu of all taxes, rates or impositions whatsoever.

The trustees erected a market under this act on the lands specified : all of which were in the said parish of M.

A subsequent act, 57 G. 3, c. lrv., authorized the trustees to purchase additional ground within one thousand yards of the then present market, and appropriate it for the purposes of the market, and enacted that

the same, when so set out, should be deemed and taken as part of the then present market-place to all intents and purposes. It further provided that the former act, and all and every the authorities, powers, provisions, regulations, clauses, matters and things therein contained, except such as were thereby varied, &c., or as were repugnant to, or otherwise provided for by, that act, should be in full force and effect, and should extend to, and be practised, applied, &c., for effecting the purposes of that act, as fully and effectually, to all intents and purposes, as if all such authorities, &c., were repeated and re-enacted in the body of that act with relation thereto. This act contained no provision affecting the subject of rating the additions thereby authorized, and no enactment in form repugnant or referring to the enactments in the former act on the subject of rating the market-place.

Under the second act the trustees made additions to the market-place, within the prescribed distance, but situate within the parish of B. ; they occupied these additions themselves, and collected tolls in respect thereof. There was never any surplus revenue after paying the annual expenses and interest. The parish of B. rated the trustees to the poor rate in respect of these additions at the full ratable value for the time being, according to stat. 6 & 7 W. 4, c. 96. The trustees having appealed, no evidence was given on the trial of the proportion at which the additional site was rated in 1768 ; but it was shown that in 1817 it was rated at a lower value than in the rate appealed against.

Held, that the general words of incorporation in the second act must have such a meaning as would stand with reason and right, and must therefore be limited so as not to incorporate the provision in the first act as to the proportion of rating.

Held also that, notwithstanding the special purposes to which the revenue was applied, the trustees were liable to poor rate in B. for the additions to the market-place situate in that parish, and that the amount at which they were rated was correct. *Regina v. Badcock*, 787.

XI. Ratable value : deductions from gross annual receipts.

1. For other ratable property necessary for the profitable enjoyment, 179. Anté, IX.
2. Not renewals out of capital, 179. Anté, IX.
3. Not interest on original outlay, 179. Anté, IX.
4. Income tax in respect of mere occupation, 179. Anté, IX.
5. Not losses on other ratable property occupied for the profitable enjoyment, 179. Anté, IX.
6. Percentage on value of movable stock, 179. Anté, IX.

7. Not for outlay in nature of landlord's improvements, 179. *Anté*, IX.

8. According to rents at time of local act being passed, 787. *Anté*, X.

XII. Settlement by birth.

Evidence of place: baptismal register, 801. *Post*, XV.

XIII. Settlement by apprenticeship.

1. Construction of deed as to the person bound.

To prove the settlement by apprenticeship of Joseph Beaumont, an indenture was put in, dated, and purporting to be between Joseph Roberts, of one part, and John Beaumont of the other.

It was very inaccurately worded and spelt. It witnessed "that the said John Beaumont hath, of his own free will, and with the consent of and by his father's John Beaumont, has put and bound himself apprentice to and with the said Joseph Roberts, and with him after the manner of an apprentice to dwell, remain and serve, from the date hereof, for, during and untill the term of his attain ages 21 thence next following be fully compleated and ended;" during which term "the said apprentice his said master shall serve," &c. "And the said Joseph Roberts" doth covenant with "the said Joseph Beaumont, apprentice," to teach him, &c., to pay him 3s. "yerely and every year during is apprenticeship," and to allow him two weeks to go to school, "yerely and every year during his apprintiship." "In witness whereof, the parties above named to these present indentures have set their hands and seals." And, at the bottom, followed "Joseph (L. s.) Roberts. Joseph (L. s.) Beaumont."

Joseph Beaumont gave evidence that he was bound by the above indenture, and served under it. *Held*:

1. That it appeared from the deed that the John Beaumont, party thereto, was the Joseph Beaumont therein named apprentice.

2. That extrinsic evidence might be given that the person so meant was the pauper, and that he had executed the indenture.

3. That the meaning of the parties sufficiently appeared to be that the apprentice should be bound until he attained the age of twenty-one.

4. That this, combined with the date of the indenture, might by extrinsic evidence of the pauper's age be made sufficiently certain as to the term for which he became bound.

5. That the sessions, upon the above evidence, were justified in finding a settlement by apprenticeship. *Regina v. Wooldale*, 549.

2. Construction as to term, 549. *Anté*, 1.

3. Application of extrinsic evidence, 549. *Anté*, ..

XIV. Settlement by renting a tenement.

1. Examinations defective in not showing occupation under a yearly hiring.

A pauper was removed to S. on the examination of P., and A. P. deposed that, on 22d July, 1839, he let to pauper's husband a house in S., "at the rent of 10*l*. per year," that the husband "occupied the house until 22d July, 1841," and paid P. "the whole of the rent during that time." A. deposed that the husband in July, 1839, went to the house, and "resided in that house until March, 1842."

Held, dissentiente COLBRIDGE, J., that the sessions were not entitled to affirm the order of removal, the examinations not showing that the house had been occupied for a year under a yearly hiring within stat. 1 W. 4, c. 18, s. 1. *Regina v. St. Sepulchre*, 580.

2. What must be "separate and distinct."

In stat. 6 G. 4, c. 57, s. 2, the words "separate and distinct" apply to "dwelling-house and building," but not to "land."

Therefore a settlement may be gained under that clause by one of two persons holding land jointly at a rent of 7*l*. paid by them in equal proportions, if the renting be in all other respects conformable to the statute.

Regina v. St. Lawrence Appleby, 842.

3. Joint holding of land, 842. *Anté*, 2.

XV. Removal: to maternal settlement.

Without showing inquiry as to father's settlement.

Pauper was removed to his mother's maiden settlement in Y. His father, in the examination, stated that he believed that he himself was born in London, but had never heard in what parish, and had never done any act to gain a settlement in his own right. *Held* that, on proof of the mother's settlement in Y., the justices might remove pauper thither, and that, on appeal against the removal, the respondents, at sessions, might rely *prima facie* on the mother's maiden settlement, without proving any inquiry made as to the settlement of the father.

The mother's brother, in the examination, stated that she was born at Y. and was the person mentioned in a certificate of baptism, which was produced, and at the date of which he was less than four years old. *Held* to be evidence, on which the removing magistrates might act, of the mother's birth in Y.

The respondents, on the hearing of an appeal, may prove their case by a witness not produced before the removing magistrates, and may omit calling a witness who appeared before the magistrates, though the appellants require it and the witness is in court. *Regina v. Yelbertoft*, 801.

XVI. Removal: examinations generally.

1. Are not admissions by the respondents, 567. *Post*, XX. 1.

2. Strict construction as to showing occupation under yearly hiring, 580. *Anté*, XIV. 1.

3. *Primâ facie* case, 801. *Anté*, XV.

4. What sufficient as regards removing justices, 801. *Anté*, XV.

XVII. Removal: formal parts of the examination.

Heading and jurat.

On appeal against an order of removal, it appeared, by the copies of examinations sent, that the examination of R., (which was essential to the settlement,) was alleged in the jurat to be taken and sworn before, and was signed by two parties, whose names only, without any description of their office, were given. The heading did not show before whom the examination was taken; and the name of the party examined appeared in the heading only. *Held*, that the order must be quashed.

Although, on the same sheet of paper with, and preceding R.'s examination, was an examination of S., headed "The examination of S., the pauper, taken upon oath before us, two of her Majesty's justices," &c., (describing their character properly,) the jurat of which was signed with the same names as the other examination; and although the headings and jurats gave the same date to each examination; and the examination of R. mentioned S. as the pauper. *Regina v. Shipton upon Stour*, 119.

XVIII. Removal: formal parts of the order.

Margin part of the order, so as to supply the name of the county, one only being mentioned in the order.

An order of sessions, confirming an order of removal, had in the margin the words "Westmoreland, (to wit,)" and proceeded: "To the overseers of the poor of the township of K., and to the overseers of the poor of the township of C. in the said county. Whereas you, the overseers of K., have made complaint unto us whose names are hereunto set and seals affixed, being two of her Majesty's justices of the peace and quorum in and for the said county," &c. The rest of the order was in the usual form, and did not further state the county in and for which the justices acted.

Held, that the jurisdiction sufficiently appeared by reference to the margin, which was part of the order for this purpose.

An order of sessions on appeal against the above order, after setting forth the caption of the quarter sessions, proceeded: "At which said general quarter session" &c., "an appeal against a certain order," &c., "is depending for trial, which said order is" "as follows," (setting it out:) "and whereas the overseers" &c. "of C. did prosecute and carry on the said appeal to trial against the said order to the present general quarter

sessions of the peace, and wherein this court upon hearing of counsel on both sides ordered that the said order be confirmed."

Held, on certiorari and motion to quash that the order of sessions sufficiently showed an adjudication confirming the order of removal. *Regina v. Casterton*, 507.

XIX. Appeal against order of removal: entry.

1. Cannot be entered by respondents, 158. *Post*, XXIII. 1.

2. May be entered as a matter of right by appellants even for the mere purpose of obtaining costs, 163. *Post*, XXIII. 3.

XX. Appeal against order of removal: trial.

1. Respondents are not tied up as to any head of settlement set forth in the examinations.

The examination of a pauper showed that he was born in the appellant parish, and was afterwards bound and served as apprentice, and inhabited, under such service, partly in the appellant parish and partly in the respondent parish, and more than forty days in each. The respondents proposed, at the sessions, to rely on the birth settlement. *Held*, that they were not precluded from so doing by the fact that the examination contained allegations, which, if true, showed a subsequent settlement by apprenticeship.

The appellants relied upon a settlement in the respondent parish, and proved that, on the last night of the service, the pauper slept in that parish. *Held* that, to establish this settlement, they must prove the apprenticeship, and could not treat it as admitted by the respondents, though the latter had sent examinations in which it was alleged, and it had not been traversed by the grounds of appeal.

Under stat. 5 G. 2, c. 19, s. 2, an order, removed by certiorari, is "confirmed" by simply discharging the rule for quashing it. *Regina v. Latchford*, 567.

2. Appellants setting up a subsequent settlement cannot treat it as admitted by the examinations, 567. *Anté*, 1.

3. Witnesses examined before the removing justices not necessarily to be called on the trial of the appeal, 801. *Anté*, XV.

XXI. Order of sessions.

What shows a sufficient adjudication, 507. *Anté*, XVIII.

XXII. Mandamus to enter continuances and hear.

Affidavits must show refusal to have been wrong, 750. *MANDAMUS*, II. 3.

XXIII. Appeal against order of removal: costs.

1. Order for, ancillary to bad order of confirmation, cannot be separated from it.

Parish officers, having given notice of appeal against an order of removal, served a countermand, stating that they did so on account of the absence of a witness, but should give fresh notice of appeal. The counter-

mand was too late for the sessions. At the sessions, the respondents entered the appeal and moved for costs. The sessions made an order, whereby, after reciting that service of notice of appeal on the respondents had been proved, and that no one appeared for the appellants to prosecute such appeal, they adjudged that the order of removal should be confirmed, and that the appellants should forthwith pay the respondents 15*l.* for their costs and charges which they had incurred and been put to in attending the sessions that day to support the order.

Held, on motion to quash, that the order of confirmation was bad for want of jurisdiction, and that the order for costs could not be separated from it; and therefore that the whole must be quashed.

Semble, per PATTERSON, WILLIAMS, and COLBRIDGE, J., that an order for costs of the day only would have been good, under stat. 8 & 9 W. 3, c. 30, s. 3. *Regina v. Stoke Bliss*, 158.

2. How costs are to be obtained where appeal not entered, 158. *Ante*, 1.

3. Entry by appellants for purpose of obtaining costs.

On notice of appeal against an order of removal, the removing parish served a supersedeas, and tendered 2*l.* for costs of appeal. It was a rule of the sessions to allow no more costs than 30*s.* on such appeals. The appellants refused the 2*l.*, their costs amounting to a larger sum; and at the next sessions they moved to enter the appeal, for the purpose of obtaining full costs. The justices refused to enter it, alleging their rule of practice as a reason.

Held, that the justices ought to have entered the appeal, and exercised their discretion as to costs upon a hearing. Mandamus granted, to enter continuances and hear. *Regina v. Merimethshire, Justices*, 163.

4. Practice of sessions as to, 163. *Ante*, 3. XXIV. On hearing of special case.

Form of judgment, 567. *Ante*, XX. 1.

XXV. Bastardy: jurisdiction under 2 & 3 Vict. c. 85.

1. Right of the party charged to have the case heard at the quarter sessions.

Under stat. 2 & 3 Vict. c. 85, if application was made for an order of maintenance, and the party charged allowed the case to be partly heard at petty sessions by witnesses being examined, he could not take away the jurisdiction of the petty sessions by declaring under sect. 3, that he was desirous that the charge should be heard at the quarter sessions. The election must have been made before the hearing commenced.

An order of maintenance directed the party charged to pay a sum for expenses incurred since the birth of the child, which

was stated in the order to have taken place more than six months before the order. *Held* bad under stat. 4 & 5 W. 4, c. 76, s. 73, although it was deposed that the expenses were calculated only for the time during which the child had been chargeable, which was less than six months. But, *held*, that the order was nevertheless good as to the residue, which directed payment in respect of future expenses.

The order directed payment to be made to the churchwardens and overseers of a township to which the child was chargeable. The township had overseers, but no churchwardens; the parish in which the township lay had churchwardens. *Held*, no objection to the order. Per PATTERSON and WILLIAMS, J., dubitante Lord DENMAN, C. J. *Regina v. Oxley*, 256.

2. By waiver of demand of removal to quarter sessions.

On application at petty sessions by guardians of a union, for an order of maintenance under stat. 2 & 3 Vict. c. 85, s. 1, the party charged attending, but not being ready to proceed, the case was postponed by consent, the defendant agreeing to admit that notice of application had been served. The admission was made; and the guardians proved by a witness that the notice was signed by the proper parties. At the adjourned petty session the defendant, being still unprepared, demanded, (under sect. 3,) that the case should be heard at the quarter sessions, and offered recognisances. The justices refused to take them, alleging that the case had already been entered upon at the last petty sessions. The hearing proceeded; and the defendant, by his attorney, cross-examined the witnesses, and addressed the justices in his defence. An order of maintenance was granted. On motion for a certiorari,

Held, assuming the justices to have been wrong in refusing to take the recognisances, that the party charged had waived the objection by making his defence. Writ refused. *Regina v. Clarke*, 349.

XXVI. Bastardy: order of maintenance.

1. For past maintenance, bad for not showing that it was incurred within six months, 256. *Ante*, XXV. 1.

2. Bad in part and good in part, 256. *Ante*, XXV. 1.

3. Not bad for directing payment to churchwardens and overseers of a township which has no overseers, 256. *Ante*, XXV. 1.

XXVII. Bastardy: costs.

What not a hearing.

On application to two justices under stat. 2 & 3 Vict. c. 85, s. 1, by guardians of a union, for an order of maintenance, an objection was successfully taken to the evidence offered to prove that the notice of

application was signed by a majority of the guardians; no other evidence was given; and the justices thereupon refused to make an order. *Held*, that the justices were not bound to award costs under stat. 4 & 5 W. 4, c. 76, s. 73, for that there had been no "hearing" of the application. *Regina v. Hastings, Lord*, 141.

XXVIII. Bastardy: prosecution for disobedience of order.
Compromise.

Guardians of a poor law union indicted plaintiff for disobeying an order of sessions for maintenance of a bastard. Before trial, plaintiff offered a compromise; and the clerk to the guardians, on their behalf, agreed with him for a sum, on account of costs and maintenance, which he paid; and the indictment was dropped. Afterwards, plaintiff discovered that the order of sessions was defective and void; and he brought assumpsit against the clerk for money had and received.

Held, that the clerk was not liable, having done nothing in the prosecution beyond preferring the indictment.

And that, if the compromise was illegal, plaintiff, being in *pari delicto* with the other parties offending, could not sue them for money which he had paid. *Goodhall v. Lowndes*, 464.

XXIX. Pauper lunatics.

Where county asylum full.

Stat. 9 G. 4, c. 40, s. 38, empowered justices, by order, to remove lunatic paupers to the county lunatic asylum established under that or any other act; "and, if no such county lunatic asylum shall have been established," then to some public hospital or house licensed for the reception of insane persons.

Held that justices, under this clause, could not remove to a licensed house, in a county for which a county asylum was established, but which asylum was too full to receive the pauper. Though it was assumed that the case, if not within s. 38, was unprovided for by the act. *Regina v. Ellis*, 501.

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Power to do so without summons or hearing.
 Queen Elizabeth, by charter, founded and endowed a grammar school at D., and incorporated certain persons and their successors as governors, and granted to them for ever full power and authority from time to time of electing, nominating, and appointing a master and usher of the said school so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, and of removing the same master or usher from the said school, according to their sound discretion, and of placing or appointing other or others more fit in their stead or steads.

Held by the Court of Queen's Bench, and by the Court of Exchequer Chamber affirming their judgment, that, by the terms of the charter, the governors might, in their discretion, remove a master without summons or hearing, and although no charge against him had been exhibited to them.

The governors were empowered by the charter to make by-laws, and, in 1748, they enacted a by-law, requiring certain qualifications in the future masters, and ordaining, (for the encouragement of well qualified persons to accept the office,) that no master should thereafter be displaced, removed or removable from the office, unless some sufficient cause of complaint should be exhibited in writing against such master, and signed by the governors or their successors, and the same cause of complaint be first allowed of and declared by them to be a sufficient cause.

Held by both courts, that the governors had no right thus to limit the discretion given by the charter, and that the by-law was void.

To a mandamus requiring the governors to restore a master whom they had dismissed, and alleging that he had always behaved himself well, &c., the governors made return, stating the charter, and averring that the prosecutor did not always behave himself well, &c., and that they received complaints from parents of the scholars, namely, from A. B. and C. D., of the prosecutor's misconduct and inattention, and particularly that, &c., (specifying complaints made by A. B. of particular acts of misconduct:) that the governors gave the prosecutor notice of the complaints, and called upon him to answer, which, (after having reasonable time and opportunity,) he failed to do; and that the governors, being satisfied of the truth of the charges, in the exercise of their best discretion, and deeming the prosecutor an unfit person to be master, discharged him. Prosecutor took several traverses, denying that he had committed the acts charged, or that he had reasonable time, &c., to answer. He also pleaded the above by-law, and that no sufficient cause of complaint, exhibited in writing, was, before his dismissal, allowed according to the said law. The governors joined issue on the traverses, and replied to the plea, stating acts of misconduct, notice thereof to the governors, complaint in writing exhibited by them setting forth the causes, which were sufficient for dismissal, delivery of the written complaint to prosecutor, omission by him to answer, though he had reasonable time and opportunity, allowance of the charges by the governors, and dismissal thereon. Rejoinder, denying that a complaint in writing, stating sufficient cause, was delivered to prosecutor, or allowed by the governors. Issue thereon.

A verdict being found for the crown on all the issues, the Court of Queen's Bench gave judgment for the defendants non obstante veredicto.

Held by the Court of Exchequer Chamber that, under stat. 9 Ann. c. 20, s. 2, (and consequently under stat. 1 W. 4, c. 21, s. 3.)

judgment non obstante veredicto may be given for the party making return to a mandamus, and that it was rightly given here.

Quere, by the Court of Exchequer Chamber, whether, in other cases than that of mandamus, judgment non obstante veredicto may be given for a defendant as well as for a plaintiff. *Semble*, per PARKER, B., that it may. *Regina v. Darlington School, Governors*, 682.

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Scire facias. Declaration, that plaintiff, as public officer of a banking company, under stat. 7 G. 4, c. 46, recovered in the original action against B., as the registered officer of a steam-packet company to which letters patent had been granted under stat. 7 W. 4, & 1 Vict. c. 73, damages by reason of the non-performance of a promise of the steam-packet company, and costs; that plaintiff was still one of the public officers of the banking company; and that, although judgment had been given, execution of the damages still remained to be made; that the defendant in the *sci. fa.* at the time of the making of the promise, and from thence until and at the giving of the judgment, was, and thence hitherto hath been, and still is, a member of the packet company. *Held*, that the declaration was not bad for not showing whether the letters patent contained any declaration, under stat. 7 W. 4, & 1 Vict. c. 73, s. 4, limiting the liability of defendant in the *sci. fa.* to any, or to what extent; such limitation, if any existed, being matter that ought to be pleaded by defendant; and that the declaration, alleging that defendant was a member when the promise was made, showed sufficiently that he was a member when the cause of action accrued.

Plea 3, that defendant was not, at the time of the commencement of the original action, liable thereto, as an existing or a former member of the packet company; concluding to the country. *Held* bad on special demurrer, as not taking issue on any matter alleged in the declaration, and yet concluding to the country.

Plea 4, that the packet company was not formed by any deed of partnership, &c., in compliance with stat. 7 W. 4, & 1 Vict. c. 73: verification. *Held* bad, on special demurrer, as setting up a defence which might have been pleaded to the original action.

Plea 5, that the original action was for a demand in respect of which neither the defendant in the sci. fa. the packet company, nor the defendant in the original action as such registered officer, was by law liable, as plaintiff at the commencement of the action well knew; and that, the registered officer of the packet company and the plaintiff well knowing the premises, the registered officer of the packet company fraudulently and deceitfully, and by connivance with plaintiff, suffered the judgment in order to charge defendant in the sci. fa.: verification. *Held*, that the plea was good, as containing a sufficient allegation of fraud and collusion between plaintiff and the nominal defendant in the original action; and that the defendant in the sci. fa. was entitled to avail himself of such defence by plea.

Semble, that defendant might have availed himself of that defence by motion to set aside the judgment.

Plea 6, setting out the record of the original judgment, which was in an action of assumpsit by endorsee against drawer on a bill of exchange drawn and endorsed by B. as the agent of the packet company, that B. did not, as agent of defendant, draw or endorse the bill, nor did defendant ever ratify the drawing or endorsing thereof: verification. *Held* bad, on special demurrer, because the defence might have been pleaded to the original action. *Philpott v. Egremont, Earl*, 587.

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If the sheriff, having a writ of execution delivered to him, unnecessarily delay putting it in force, an action on the case lies against him at the suit of the execution creditor, though no actual pecuniary damage has arisen from the default.

The measure of damages for such default is not necessarily the whole debt, but such a sum as the jury think equivalent to the real loss.

If there has been no actual loss, still, in the case of final process, the plaintiff must have nominal damages.

It is sufficient, in such action, if the jury find that the sheriff could have executed the process and omitted doing so; it need not be expressly found that he ought to have executed. *Clifton v. Hooper*, 453.

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- I. Contract for transfer of services of apprenticed negroes formerly slaves.
1. Illegality not intended.

Declaration in debt alleged: That, by agreement made, to wit, on 25th September, 1834, between plaintiff and defendant in consideration of 7800*l.*, payable as after mentioned, plaintiff did sell, assign, transfer and make over all his right, title and interest in and to the services and labour of one hundred and fifty-three apprenticed labourers formerly slaves, belonging to plaintiff, for and during the term of their apprenticeship, to defendant, his heirs, executors or assigns, and engaged to warrant and defend him from all claims and demands upon, and, otherwise, as far as was in plaintiff's power, to guarantee the undisturbed possession of the services of such labourers according to law: and defendant promised to pay plaintiff the 7800*l.* in six instalments of 1300*l.*, at specified annual periods: and it was agreed that, in case of failure in the regular payment of any instalment, plaintiff should be entitled to reclaim the services of such labourers during the residue of the term of apprenticeship, and the services should revert to plaintiff, defendant remaining liable for such sums as should be then due for the value or hire of the labour during such period as defendant should have received the services; at the rate of 1300*l.* per annum. Averment, that defendant had the services, to wit, from the time of making the agreement for and during the term of the apprenticeship, and plaintiff was always ready and willing to warrant, &c., and did warrant, &c., and otherwise guarantee, &c., (in the terms of the agreement,) and defendant had undisturbed possession, &c., during the term, but, although defendant paid four of the instalments, and the time for paying the other two had elapsed, he did not pay, &c.

Held, by the Court of Queen's Bench, (on objection taken upon argument of demurrer to a plea,) that it did not appear, and the court would not intend in the absence of express statements, that the agreement was

in any respect contrary to the law of England generally, or to stat. 3 & 4 W. 4, c. 73, s. 10: That, if the validity of the agreement depended on s. 10, the plaintiff was not bound to state that any act of assembly, &c., mentioned in that clause, had been made and complied with, or that none had been made: And that the declaration was good.

Judgment affirmed by the Court of Exchequer Chamber.

Plea 3 to the above declaration, that during the term for which the services were transferred, and before either of the last instalments became due, plaintiff, against the will of defendant, removed the labourers from his plantation to that of plaintiff, and there detained them from thence hitherto, and defendant has never had their services since the removal: And further, that defendant declined to pay the last two instalments, and failed in the regular payment of one, and thereupon the services of the labourers reverted to plaintiff according to the agreement; and that all sums due at the time of such failure for the value or hire of the labour while defendant had the services were paid.

Held, by the Court of Queen's Bench, on demurrer, a bad plea, as not showing that the plaintiff exercised his right to reclaim, on default made by the defendant.

Judgment affirmed by the Court of Exchequer Chamber.

Plea 1. That, before either of the last two instalments became due, the agreement was rescinded by and with the consent of plaintiff and defendant. Plea 4. That the agreement was made at Berbice in British Guiana between British subjects, and was made for the purpose of transferring, and purported to transfer and assign the services of the one hundred and fifty three labourers during the term of their apprenticeship according to the statute. That after such agreement, defendant had the services till August 1838: that in July, 1838, the governor and council of Berbice, according to the statute and the usages of the colony, made an ordinance that all persons who on 1st August, 1838, were apprenticed labourers should, from that day, be discharged from such apprenticeship; and thereupon, and before breach of the agreement, the labourers were discharged &c., and the parties to the said agreement were prevented and prohibited by the authority aforesaid from further performing the same. Averment that defendant paid the instalments for the whole time during which he had and could by law have the services. Replication to plea 1, That the agreement was not by and with the consent of plaintiff and defendant rescinded. To plea 4, That the parties were not prevented or prohibited

by the said ordinance from further performing the agreement. Issues thereon.

On a special case, setting forth the pleadings and stating that the ordinance was made as pleaded, *Held* by the Court of Queen's Bench, that the act of the colonial government, determining the apprenticeship, was not such a consent of British subjects in the colony as would support the averment of plea 1. And, as to plea 4, that the agreement was not a contract of hiring and letting, but an absolute contract for a sale and transfer of plaintiff's right to the services for a gross sum of money, due in present, though payable by instalments; and that plaintiff was entitled to the last two instalments, although the legislature had determined the apprenticeship before they came due. And that both issues must be found for plaintiff, and judgment entered accordingly.

Judgment on plea 4, affirmed by the Court of Exchequer Chamber.

Plea 2. That the agreement was made in Guiana, &c., and for the purpose, &c., (as in plea 4:) and that, before the agreement, an ordinance was made by the government of the colony, under stat. 3 & 4 W. 4, c. 73, and, according to the laws, &c., of the colony, enacting that no deed or instrument should be good or valid in law to pass or convey, or affect the services of any apprenticed labourer, unless a memorandum of such deed, &c., were made in a book to be kept for that purpose in the colonial registrar's office within one month after executing such deed, &c. Averment, that such book was kept in the office, but that no memorandum of the said agreement was made according to the ordinance within one month of executing the agreement. Replication, that no book was kept for the purpose of the plea mentioned. Issues thereon.

Held by the Court of Queen's Bench, that although by the omission to register, the agreement so far became void that the vendee could no longer claim the services, it was not void as to the vendor's claim for purchase money: that the vendee was the party who ought to have registered: and that if the omission could have been a defence, the plea ought to have shown that the duty of registering lay on the plaintiff. A verdict having been taken for defendant on the last mentioned issue, the court gave judgment for the plaintiff non obstante veredicto.

Judgment affirmed by the Court of Exchequer Chamber. *Mittlholzer v. Fullerton*, 989.

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A count on stat. 1 & 2 P. & M. c. 12, s. 2, alleged that plaintiff's horse was distrained damage feasant, delivered to defendant as pound-keeper, and by him impounded and kept in the pound for one whole distress: and that, while the horse was so impounded, defendant, being such keeper, demanded and took from plaintiff, for keeping the same in pound, 3s., being more than the sum of 4d. for one whole distress. *Held* bad, on motion in arrest of judgment, for not laying the act as done against the form of the statute: though the count went on to say, "whereby, and by force of the statute in such case," &c., "an action hath accrued to the plaintiff, being the party grieved, to de-

- mand," &c., 5*L*, "and also the further sum of 2*s*. 8*d*., the said last mentioned sum being the sum of money which the defendant took above the sum of 4*d*. for such whole distress." *Fife v. Bouzfield*, 100.
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XLIII. 5 & 6 W. 4, c. 76. (Municipal corporations.)

1. Sect. 47. Election of councillors: ordinary and occasional vacancies.

A councillor to fill upon occasional vacancy under stat. 5 & 6 W. 4, c. 76, s. 47, and councillors to replace the third part of the council annually going out of office, ought not to be chosen at one and the same election. Stat. 7 W. 4, & 1 Vict. c. 78, s. 11, does not prospectively sanction such a proceeding.

An election having been held to fill up an occasional vacancy and the ordinary ones at the same time, a quo warranto information was brought against a party claiming to have been elected to fill one of the ordinary vacancies. Issues being joined on averments raising the question whether he was duly elected, it appeared on the trial that voting papers were delivered containing the particulars required by stat. 5 & 6 W. 4, c. 76, s. 32, that the defendant was named in a majority of such papers, and that the presiding alderman and assessor declared him and two others elected to fill the ordinary vacancies, and a fourth party to fill the occasional one. Defendant endeavoured to show by this and other evidence that the voters understood, at the time of the election, which persons were candidates to fill the ordinary and the occasional vacancies respectively, and that they gave their votes accordingly. The judge told the jury that the information which enabled the presiding officers to declare defendant elected to fill an ordinary and not the occasional vacancy, was by law to be derived from the voting papers alone.

Held, on bill of exceptions and writ of error to the Exchequer Chamber, that the direction was right. Judgment for the crown affirmed.

On writ of error to the Exchequer Chamber upon judgment on a quo warranto information, the party in whose favour the Court of Error decides is not thereby, and by stat. 11 G. 4, & 1 W. 4, c. 70, s. 8, entitled to enter up a judgment of that court for his costs in error. *Rowley v. The Queen*, 668.

2. Sect. 66. Compensation, 433. *MANDAMUS*, IV. 2.

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XLV. 1 & 2 Vict. c. 110. (Insolvent debtors.)

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2. Sects. 35, 58, 87. Distress for rent, 944. *DISTRESS*, II. 2.

XLVI. 2 & 3 Vict. c. 29. (Bankrupt.)

Sect. 1. Assignment by sheriff under levy, 20. *BANKRUPT*, III.

XLVII. 2 & 3 Vict. c. 85. (Bastardy.)

1. Sect. 1. What is not a hearing, 141. *POOR*, XXVII.

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XLVIII. 4 & 5 Vict. c. 59. (Turnpikes.)

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XLIX. 5 & 6 Vict. c. 25. (Excise.)

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II. By judge at chambers, 13. *BOND*, II.

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- II. To fraudulent assignment of goods, 166. *NEW TRIAL*, II.

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- To defray costs of prosecution, 273. *CERTIORARI*, II.

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- For not proceeding to execution, 544. *ARREST*, I.

SURETY.

- Bond to secure the due accounting by A. as plaintiff's agent, does not extend to moneys received by A. and his partner, as plaintiff's agents.

The condition of a bond given by defendant to plaintiff, after reciting that A. had been appointed agent for plaintiff, which employment he had accepted, and undertaken to perform the trusts thereof, was declared to be that, if A. should, during his continuance in such employment, faithfully demean and conduct himself, and, when required, account for and pay to plaintiff all moneys which he had received or should thereafter receive for plaintiff's use, the bond should be void.

Declaration on the bond set out the condition, and averred that, while A. remained in the employment of plaintiff, as agent aforesaid, A. received for the use of plaintiff moneys, amounting, &c., but did not, when required, account, &c. Plea, that A. did not, while he remained in the service of plaintiff as such agent as in the declaration mentioned, receive for the use of plaintiff the sums mentioned.

Held, that plaintiff did not support the issue by proof that A. and B., as partners, were employed by plaintiff as agents, and in that character had jointly received money for plaintiff's use, it appearing that A. had never been employed by plaintiff, or received money for him solely.

And that no difference would be made by proof that defendant knew that A. was to be employed only as partner with B. *London Assurance Company v. Bold*, 514.

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- The coupling of a non-existing officer as payee in an order of maintenance, 256. *POOR*, XXV. 1.

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- II. By feme's attorney, 811. *BARON AND FEME* II.

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- Of highways, 323. *HIGHWAY*, V. 1.

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- Delivery of deeds to him: for whose benefit, 443. *DEED*, III. 1.

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- 1. An essential in pleading authority, 773. *PLEADING*, VII. 1.
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- I. Materiality, 282. DISTRESS, II. 3.
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- I. Exception of, in lease, 323. HIGHWAY, V. 1.
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- I. When it lies.
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 - 2. Against sheriff for seizure of goods under *fi. fa.*, 186. NEW TRIAL, II.
 - 3. Against attorney for taking goods under *fi. fa.*, 174. DAMAGES, IV.

III. Payment into court.

What assault not within exception.

In trespass for breaking and entering plaintiff's house, and assaulting his son, by means whereof plaintiff lost his son's service, the defendant may pay money into court, under stat. 3 & 4 W. 4, c. 42, s. 21, the action not being "for assault and battery," within the excepting clause of the section.

So held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench. *Newton v. Holford*, 921.

IV. Trial: practice.

Acquittal of co-defendant, 487. WASTE LAND.

V. Damages: costs of setting aside execution.

In trespass for taking plaintiff's goods in execution under a warrant of attorney and judgment, which were afterwards set aside as illegal, the plaintiff cannot claim as part of the damage his costs incurred in vacating the warrant of attorney and judgment. *Holloway v. Turner*, 928.

TRIAL.

- I. After similiter struck out by defendant and nothing substituted, 663. ISSUE, VI.
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II. Conversion.

- 1. By attorney refusing to deliver title deeds, except on payment of sum wrongfully claimed by his client, 443. DEED, III. 1.
- 2. What interruption of plaintiff's possession is not a conversion.

It is not every wrongful act depriving a party of the possession of his goods that amounts to a conversion. Where plaintiff's goods and servants were on land which defendant recovered in ejectment, and defendant on entering under the writ of possession turned plaintiff's servants off the land, and would not let them remain for the purpose of removing the goods, there having been no subsequent demand or refusal: *Held*, that the jury might find that there was no conversion. *Thurogood v. Robinson*, 769.

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I. Contract.

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IV. Delivery.

1. Constructive delivery of goods in hands of agent.

Plaintiff bought of defendant, and paid for Hops which lay at the warehouse of F., having been placed there by a party who had sold them to defendant. After the sale, plaintiff was informed that the hops were at F.'s, had them weighed there, and took away part. Some days after, he applied for the residue, but they had been taken away in the mean time by a creditor of the first seller. Defendant had not given plaintiff a delivery order, nor had he demanded one.

Held, that F. had the residue of the hops in his possession as agent to plaintiff, and that defendant was not liable to plaintiff for the non-delivery of them.

Therefore, plaintiff having brought assumpsit for the non-delivery, and defendant having pleaded that he did deliver: *Held* a misdirection to leave it to the jury whether defendant ought to have given plaintiff a delivery order. *Wood v. Tassell*, 234.

2. Delivery order, when unnecessary, 234. *Ante*, 1.3. Laches of vendee in not obtaining delivery, 234. *Ante*, 1.

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IV. Of commitment. COMMITMENT.

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WASTE LAND.

Presumption of ownership.

From situation in respect of a highway.

Where the lord of a manor has conveyed land to A., and afterwards other land to B., and it appears that a narrow strip of land passed by one or other of the conveyances, but it is doubtful by which, no presumption arises in favour of A. from the fact that the strip of land lies between a highway and land undisputedly comprised in the conveyance to A.

Where several defendants to an action of trespass plead Not guilty, with other pleas, and the plaintiff gives no evidence as against one of them, such defendant is not entitled, as of right, to claim his acquittal before the case for the defence is opened. And per Lord DENMAN, C. J., the more ordinary practice is not to direct an acquittal till the case on both sides is closed. *White v. Hill*, 487.

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Award regulating, when bad for the uncertainty of the regulations, 730. ARBITRATION, VII.

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I. Private.

1. What included in general right of passage.

Case for obstructing a right of way between two specified termini over a close called the Terrace Walk. The way was claimed as appurtenant to a messuage, in general terms, without reference to any obligation to repair. On the trial of an issue joined on a traverse of the right of way, the easement proved was a right to pass forwards and backwards over every part of the close, and not merely between the termini specified in the declaration; and it was shown that the easement was enjoyed under a grant

thereof to D., his heirs, tenants and assigns, and to certain other persons, "he, they, and every of them, from time to time, contributing and paying a ratable share and proportion towards repairing and amending the Terrace Walk."

Held no variance, the easement proved being only larger than the easement alleged, and not different in kind.

Held, also, that the obligation to repair was not in the nature of a condition precedent, and need not be alleged in the declaration.

The easement was granted in 1875; there was evidence that, for ten years next before the commencement of the action, part of the way claimed had become public.

Held not necessary to state in the declaration that such part had become public. *Duncan v. Louch*, 904.

2. Grantee's obligation to repair, nature of, 904. *Antè*, 1.

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II. Pleading.

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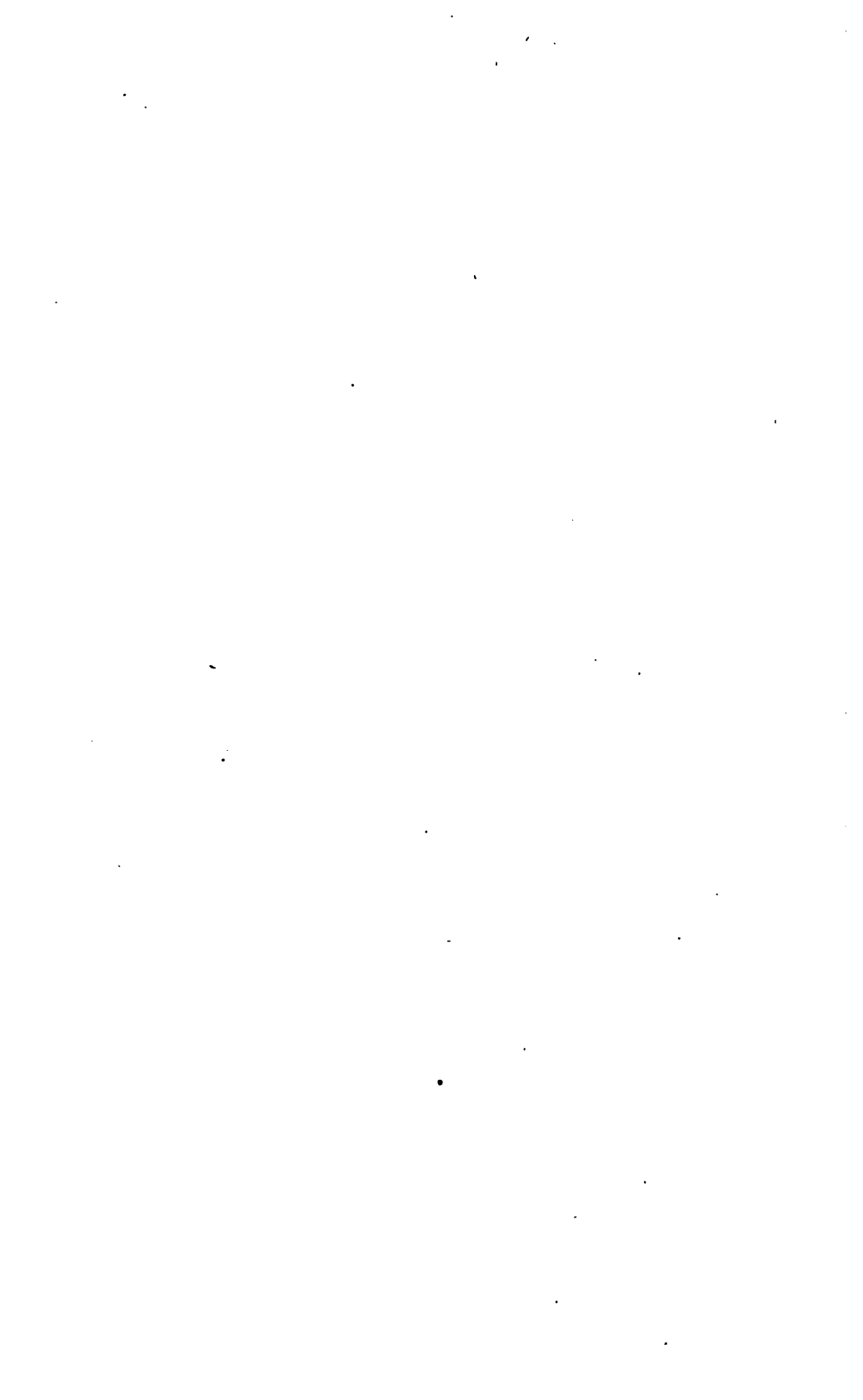
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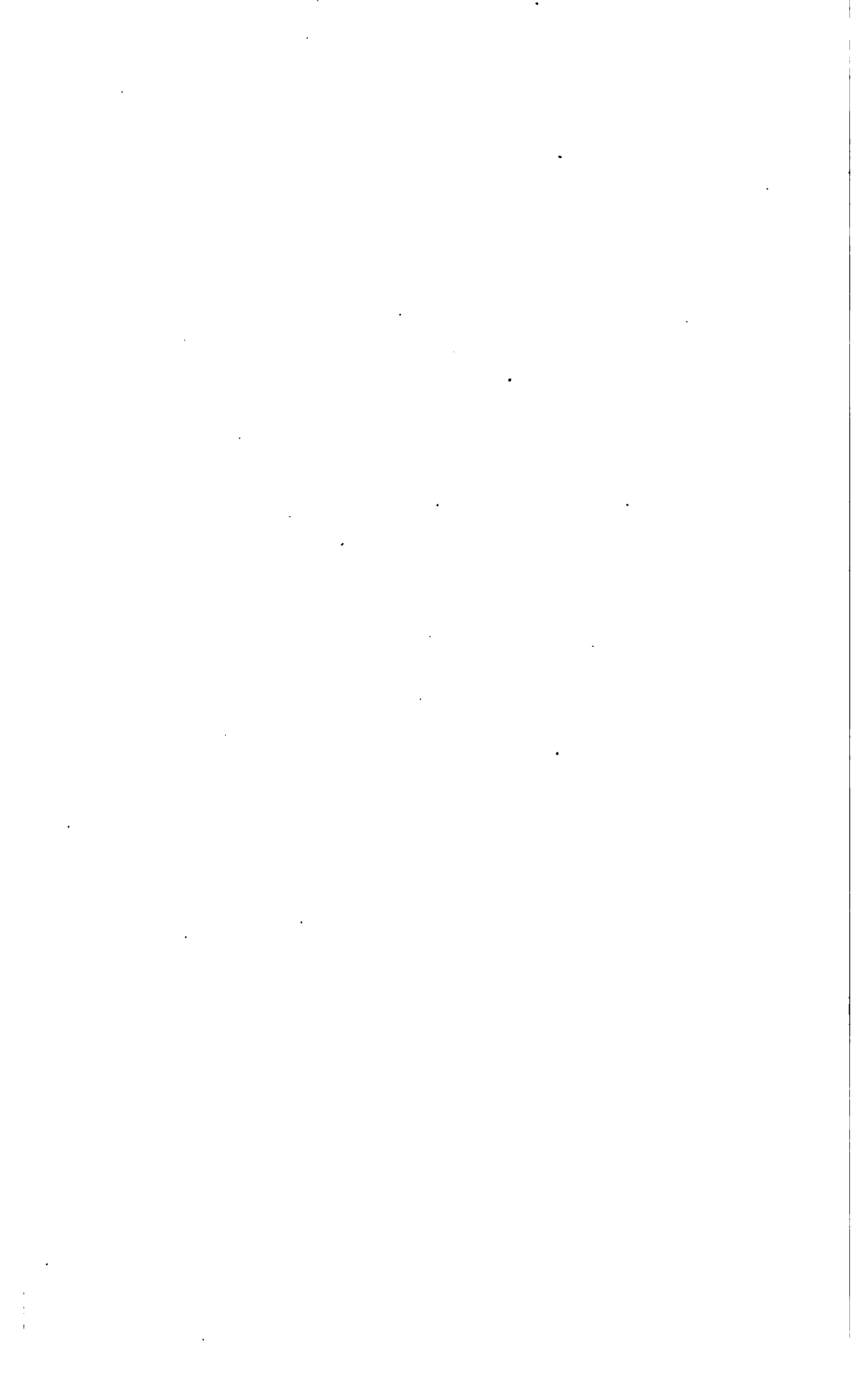
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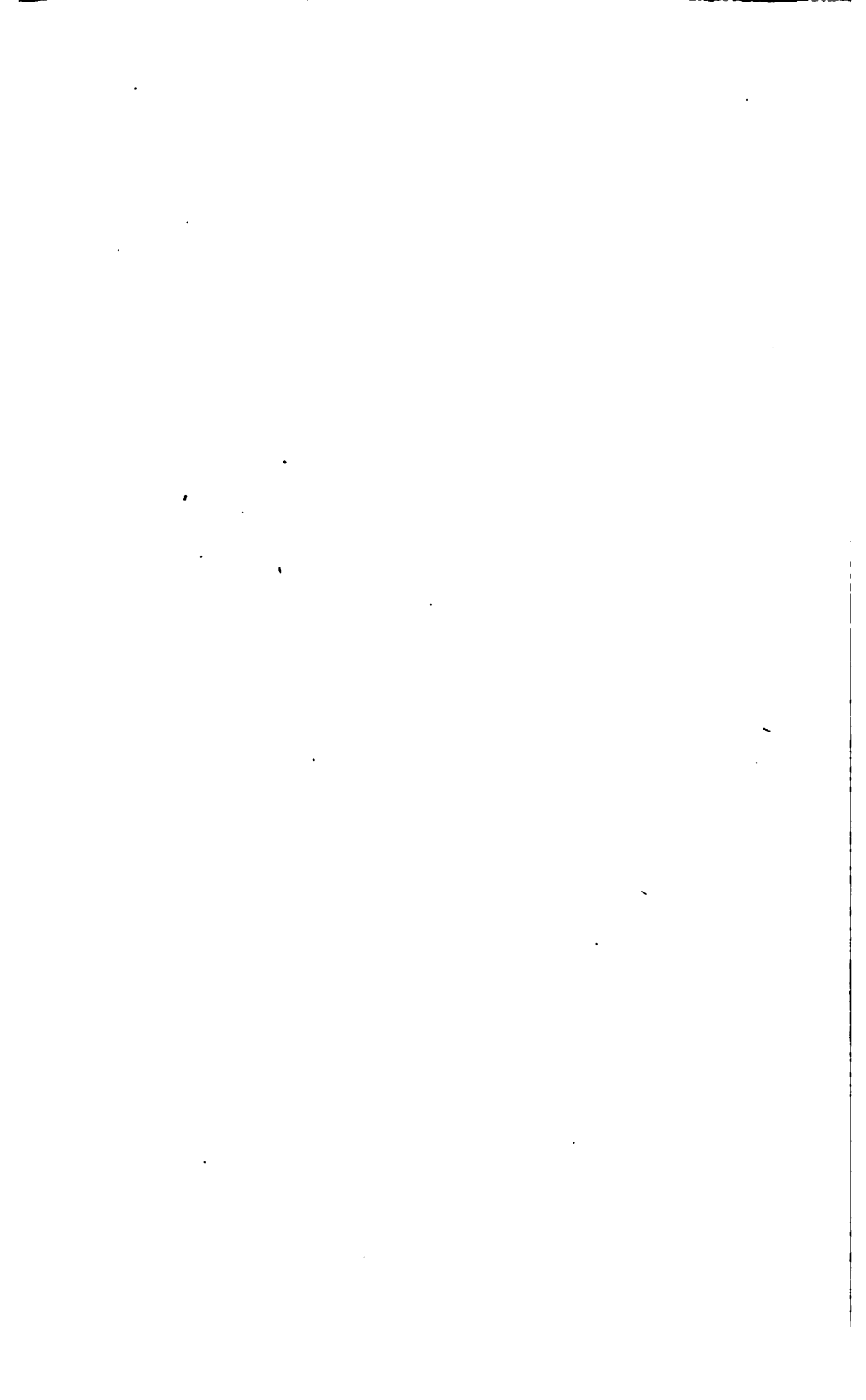
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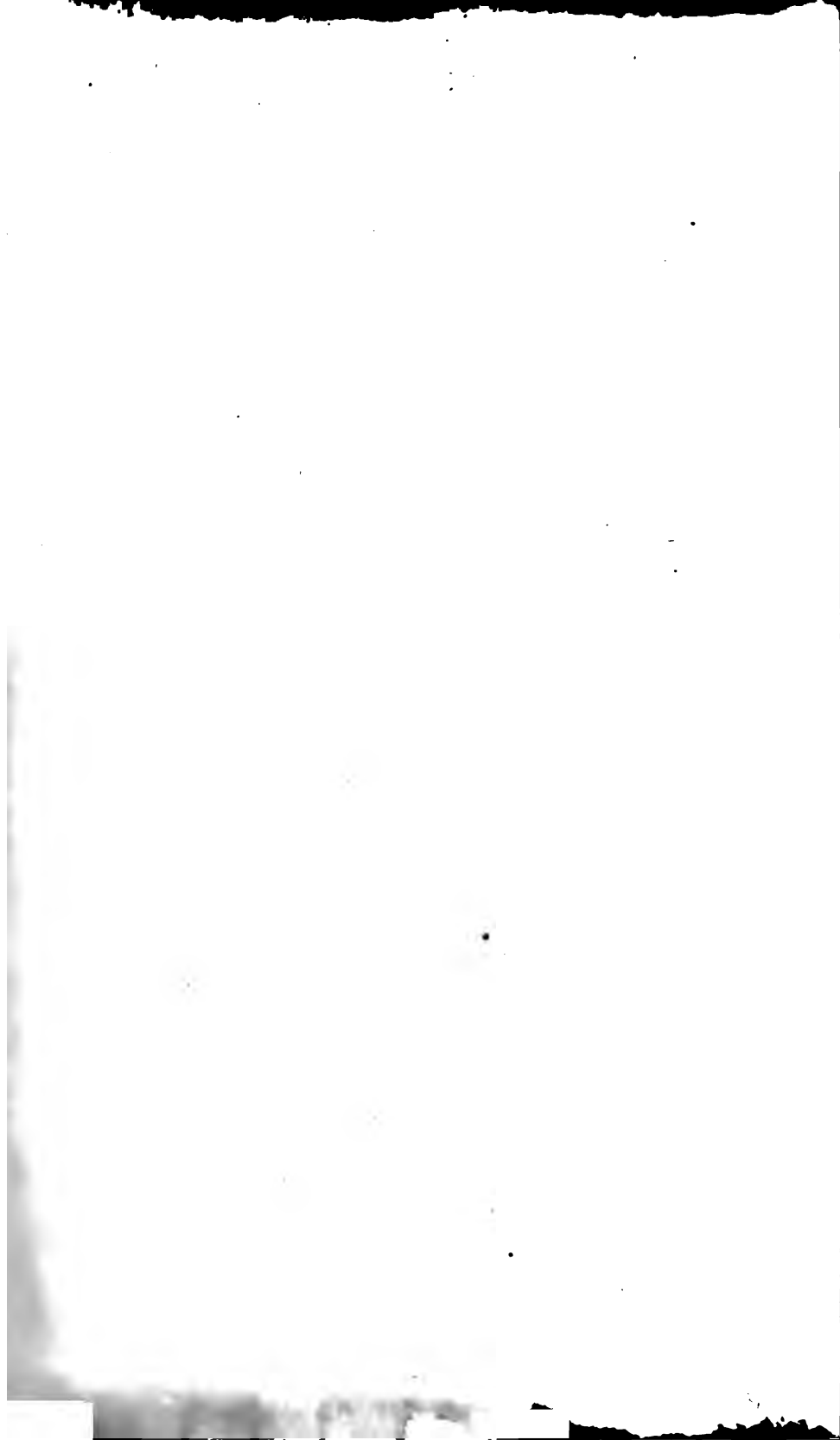
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